United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

430

No. 17,486

Willie Lee Stewart,

Appellant,

v.

United States of America,

Appellee.

Appeal From Judgment of the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. Whether, in a felony-murder case, second-degree murder instructions must be given where there was evidence, including express testimony of expert psychiatric witnesses, that the accused may have killed impulsively before forming any intent to rob.

2. Whether instructions on the defense of insanity may be sustained where they were inconsistent and misleading as to burden of proof, substantively incorrect in their definition of "mental disease or defect," and lacking any explanation that the medical and legal definitions of that term may differ, and without explanation of "productivity."

3. Whether a trial court's purportedly objective summary of the evidence which was lacking in accuracy, completeness, and impartiality as between the parties requires reversal of the conviction that followed.

4. Whether a trial court may be permitted to remove control of a defendant's case from his attorney by dictating which witnesses are to be produced and examined on the crucial issue of insanity.

5. Whether instructions informing the jury that only their unanimous recommendation could save a defendant convicted of first-degree murder from the death penalty, and not informing the jury that such unanimity also was required for the jury to impose capital punishment, constitute misinterpretation of the new District of Columbia discretionary death penalty statute and require reversal.

6. Whether, under the discretionary death penalty statute, the voir dire in a capital case must be conducted so as to identify all veniremen who are biased in favor of capital punishment as well as those who are opposed to it.

7. Whether the prosecuting attorney may exercise his peremptory challenges against prospective jurors on account of their race and thereby eliminate all Negroes from the jury trying a Negro defendant.

8. Whether the prosecuting attorney may be permitted to comment on a defendant's courtroom behavior as evidence of sanity, although the defendant did not put his demeanor in evidence by taking the witness stand, and misstate the testimony of a key witness, and refer to other matters not in evidence and prejudicial to the accused.

9. Whether a ten year delay between the indictment and the trial of a case, primarily attributable to the failure of prior prosecutions on the same indictment to afford the defendant a trial meeting constitutional standards of fairness, violates the constitutional right to a speedy trial and requires dismissal of the indictment.

I N D E X

INDEX CONTINUED

INDEX CONTINUED

INDEX CONTINUED

INDEX CONTINUED

CASES (continued) Page

INDEX CONTINUED

INDEX CONTINUED

*Cases or authorities chiefly relied upon are marked by asterisks.

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 17,486

WILLIE LEE STEWART, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal From Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was convicted in the United States District Court for the District of Columbia, Hon. Alexander Holtzoff, J., under D.C. Code Sec. 22-2401. On November 20, 1962, judgment of conviction was entered and Appellant was sentenced to death (J.A.). Appellant was granted leave to appeal in forma pauperis (Tr. 2295). The jurisdiction of this Court is founded on 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction in the fifth trial of a case which commenced with an indictment in April, 1953. This case has been before this Court three times,

and before the United States Supreme Court once. In each of the first three trials of this case, juries found Appellant guilty of felony-murder, for which the death penalty was then mandatory. Twice this Court reversed the conviction. Stewart v. United States, 94 U.S. App. D.C. 293, 214 F.2d 879 (1954); Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42 (1957). On the one occasion when this Court affirmed the conviction, Stewart v. United States, 107 U.S. App. D. C. 159, 275 F. 2d 617 (1960), the judgment was reversed by the Supreme Court. Stewart v. United States, 366 U.S. 1 (1961). The fourth trial resulted in a deadlocked jury (J.A.).

Based on this history, prior to the trial here in issue Appellant moved for dismissal of the indictment on the ground that he had been denied a speedy trial. This motion was denied. The trial commenced on October 22, 1962. On November 15, 1962, the jury found Appellant guilty as charged and invoked the death penalty. On November 20, 1962, the Trial Court denied a motion in arrest of judgment and for a new trial, and sentenced Appellant to death by electrocution (Tr. 2283-95).

From the evidence a jury reasonably could have found the following facts as to the crime itself: On the evening of March 12, 1953, Appellant left a card game with family and friends. He had unsuccessfully asked his wife for money, and he took a loaded gun with him (Tr. 315-22). At approximately 9 p.m. he entered a grocery store owned by Harry Honikman where he bought a soda and some potato chips, consuming them casually and making no effort to conceal his identity (Tr. 167). When

he asked and paid for another soda, Mr. Honikman told him he would have to leave and take it with him. While Mr. Honikman was putting the soda in a bag, Appellant walked toward the door as if leaving. Suddenly Appellant took out his gun, turned around and said: "This is it." He made no demand for money, but Mr. Honikman, and his wife and daughter who also were in the store, and only a few feet from Appellant, repeatedly offered Appellant the money in the store. Appellant did not react in any way to these offers. He looked "strange" but appeared calm (Tr. 180-82, 141). For no apparent reason he then shot and killed Mr. Honikman. Subsequently Appellant demanded that Mrs. Honikman open the cash register, and he robbed the store. He left the store, returned to close the store door, and then went home, changed his clothes, and returned to the card game (Tr. 113-118, 135-182; 190-93, 110-11, 187, 322-23). When the police sought Appellant, he unsuccessfully sought to elude them (Tr. 286-300).

Appellant may not have decided to rob the store until after committing the murder (Tr. 1051, 939). Appellant was a dull-witted, primitive, impulsive person, capable of violent, unprovoked, unthinking action, who could have committed the murder because he was annoyed at being asked to leave the store (Tr. 1284, 1317, 1440, 1622, 1623, 1711, 1885-86, 1954-55, 2050, 2061-62, 2107, 939, 1220, 1755; Tr. 902, 1275, 1393, 1435-36, 1552-54, 1748, 2045, 2105).

The principal defense again was insanity, but the evidence in this trial was very extensive. Five psychiatrists and one psychologis

for Appellant.
testified. They found Appellant of low intellectual capacity, although they classified him in differing categories which ranged from imbecile, to moron, to barely low normal. With respect to the precise etiology of Appellant's mental disease, the experts differed and some expressed uncertainty. However, they all found him mentally diseased and agreed on substantial impairments of Appellant's mental and emotional processess and behavior controls. They found elements of disassociation or lack of orientation, and characteristics indicating a pattern of unprovoked, unexplained, virtually automatic and impulsive responses, including responses of extreme violence. They concluded that Appellant was not malingering, and they related the crime to the mental abnormalities which they found. (Tr. 902, 904, 942, 943-44, 953, 988-89, 1138-39, 1145, 1146-48, 1152, 1267, 1274, 1276, 1282, 1284-85, 1314-15, 1317, 1322-25, 1354-56, 1435-36, 1439-40, 1460-62, 1487-88, 1617, 1621-23, 1624, 1667, 1684-98, 1710-11, 1716).

The testimony of the expert witnesses for Appellant was substantially contradicted in some respects by the expert witnesses for the Government, but was also partially confirmed. While the four Government experts concluded that Appellant was without mental disease or mental defect at the time of the crime, and the two who examined Appellant most recently considered him a malingerer, they nevertheless confirmed the diagnosis of mental deficiency or borderline mentality. There also were findings that Appellant was a "primitive" person, who acted spontaneously, without thinking, was given to childishly

impulsive behavior, and might have an "uncontrollable" temper (Tr, 1948-55, 1991, 2044, 2050, 2053, 2061-64, 2102, 2140).

Appellant's psychiatric evidence followed extensive lay testimony regarding Appellant's background from childhood through the time of the crime, which included an Army report showing that in July, 1946, Army psychologists and psychiatrists found Appellant mentally defective (Tr. 1552-56). The lay witnesses consisted of Appellant's blood relatives (Tr. 661 et seq., 678 et seq., 783 et seq.), his wife (Tr. 690 et seq.), his wife's relatives (387, 412 et seq., 497 et seq., 528 et seq., 574 et seq., 607 et seq.), his co-workers (Tr. 845-52, 853), and an individual who had served in the Army with Appellant (Tr. 858 et seq.). They testified to a history of mental illness in Appellant's family; to an extremely severe childhood during which he was repeatedly and brutally beaten; to highly erratic behavior as a child and failure in school; to irrational behavior in the Army; and to an extensive pattern of unprovoked violence and destructiveness, impulsive behavior, and meaningless, unresponsive actions.*

STATEMENT OF POINTS

1. The evidence required that the jury be instructed on murder in the second degree.
2. The instructions to the jury on the insanity issue were erroneous and confusing as to burden of proof, were substantively incorrect as to the definition of "mental

*A hypothetical question used by defense counsel substantially summarizes the pertinent evidence on all these matters (Tr. 916-939).

disease or defect," and were misleading both because the jury was not informed that the medical and legal definitions of mental disease or defect might differ and because "product" of a "mental disease or defect" was not explained.

3. The summary of the evidence on the issue of insanity set forth in the Trial Court's instructions was incomplete and inaccurate and, in effect, advocated acceptance of the prosecutor's contentions.

4. Defense counsel was compelled to produce all available evidence on the issue of insanity, which took control of the defense away from counsel and deprived Appellant of the effective assistance of counsel.

5. The instructions on the jury's function in fixing the penalty misinformed the jury that the death penalty was mandatory in all circumstances unless the jury agreed unanimously on life imprisonment, and failed to inform the jury that a unanimous verdict was also required for the jury to impose the death penalty.

6. The <u>voir dire</u> was prejudicially inadequate because prospective jurors were not asked whether they had any conscientious bias in favor of the death penalty, although the converse question was asked.

7. The prosecutor's use of 16 peremptory challenges to remove all Negroes from the jury was a denial of due process of law.

8. The prosecutor's comments in his summation, referring to the courtroom behavior of Appellant, who did not testify, misstating the record and supplementing it concerning a

key witness, and erroneously referring to Appellant's numerous prior infractions which were not in evidence, were prejudicially improper.

9. The prosecution of this case, nine years and six months after the indictment, constituted a denial of a speedy trial.

SUMMARY OF ARGUMENT

I. It is well established that, under a felony murder indictment, the question of whether the defendant was guilty of felony-murder or second degree murder must be submitted to the jury if there is even slight evidence warranting it. Coleman v. United States, 111 App. D.C. 210, 295 F.2d 555 (1961); Kinard v. United States, 68 App. D.C. 250, 96 F.2d 522 (1938). The jury here could have found that the murder was not committed in the perpetration of a robbery but occurred prior to the robbery, possibly due to minor provocation, and that Appellant's decision to rob the store followed the murder. There was express testimony to that effect, and it was consistent both with the crime and with Appellant's mental and emotional makeup. It therefore was error not to instruct the jury on the lesser offense, and so prejudicial an error should be noticed by this Court even though not raised in the Trial Court. Tatum v. United States, 88 App. D.C. 386, 190 F. 2d 612 (1951).

II. The instructions to the jury regarding insanity were replete with error. They erroneously placed the burden of proof on Appellant in two of the four instructions given, including the final one. Blocker v. United States, 107 App.

D.C. 63, 288 F. 2d 853 (1961). The Trial Court erroneously interpreted McDonald v. United States, No. 16,304, D. C. Circuit, October 8, 1962, as providing a single comprehensive legal definition of"mental disease or defect," and so instructed the jury, but failed to explain to the jury that the legal definition might differ from medical definitions used by the expert witnesses. This was particularly prejudicial since the Trial Court referred in its instructions to the conclusions of certain expert witnesses that Appellant did not have a "mental disease or defect." In addition, the Trial Court failed to define "product" for the jury, as required by Carter v. United States, 102 App. D.C.227, 252 F.2d 608 (1956), and as made essential by use of the McDonald definition of "mental disease or defect."

III. The Trial Court undertook to give the jury an impartial summary of the evidence on the insanity issue. By a process of misstatement and omission, however, the Court, under the cloak of judicial impartiality, presented a highly effective argument for the Government's case, which greatly prejudiced Appellant. Minner v. United States, 57 F. 2d 506 (C.A. 10, 1932).

IV. Defense counsel was entitled to determine which witnesses he would call on the issue of insanity. After extensive lay testimony and the testimony of one qualified expert, defense counsel decided not to introduce any additional evidence. The Trial Court ordered him to call and examine all available witnesses on this issue, thereby depriving him of control of his case and

forcing him to produce testimony which may have been detrimental in view of the inconsistent diagnoses of these witnesses as to Appellant's mental condition. This also was a denial of the Sixth Amendment right to the effective assistance of counsel.

V. The jury was informed that the only circumstance under which Appellant, if found guilty of the crime, could escape the death sentence, was if the jury unanimously voted life imprisonment. This was incorrect, because if the jury was not unanimous on punishment the Trial Court in its discretion could impose either life imprisonment or the death penalty. Furthermore, the jury was not informed that a verdict requiring the death penalty must be unanimous. D.C. Code Sec. 22-2404, as amended, 76 Stat. 46, 1962 U.S. Code Cong. & Ad. News 466.

VI. The prospective jurors were asked, on voir dire, whether they had any conscientious scruples against capital punishment. Those who answered affirmatively were excused. The Trial Court erroneously declined to inquire whether any prospective jurors had a similar bias in favor of capital punishment. Thus Appellant was convicted and sentenced by a jury which might not have stood indifferent as between the Government and Appellant on this fundamental issue. Funk v. United States, 16 App. D.C. 478 (1900).

VII. While Appellant, a Negro, is not entitled to be tried by a jury which includes Negroes, he is entitled to be tried by a jury from which Negroes are not deliberately excluded by Government action. The prosecutor's use of 16 of his 18 peremptory challenges to exclude all Negroes from the jury was a

denial of due process. Edgerton, J., dissenting in Hall v. United States, 83 App. D.C. 166, 168 F.2d 161, 165 (1948).

VIII. The prosecutor commented in summation that Appellant's conduct during the trial was evidence of his sanity. Since Appellant did not testify, his demeanor was not in evidence. The sole issue as to his sanity was his mental condition at the time of the offense 10 years before. Appellant's demeanor at trial therefore had no probative value. Stewart v. United States, 107 App. D.C. 159, 275 F.2d 617, 622 (1960), reversed on other grounds, 366 U.S. 1 (1961). The prosecutor's comment implied that if Appellant had really been ill, he would have taken the stand to demonstrate it. This is impermissible. Stewart v. United States, 366 U.S. 1. Other comments by the prosecutor misstated the record and improperly constituted testimony by the prosecutor. Stewart v. United States, 101 App. D.C. 51, 247 F.2d 42 (1957).

IX. The present trial was the fifth trial for a crime committed 10 years ago. Much of the delay was due to improper action by the prosecution during two of the prior trials. Appellant has been seriously prejudiced by the delays. The indictment should therefore be dismissed because a speedy trial has been denied Appellant. Williams v. United States, 102 App. D.C. 51, 250 F.2d 19 (1957).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO SUBMIT AN INSTRUCTION TO THE JURY THAT IT MIGHT RETURN A VERDICT OF SECOND DEGREE MURDER.

In Coleman v. United States, 295 F.2d 555 (1961) this Court, sitting en banc, divided 5 to 4 on the question of whether, in a prosecution for felony-murder, where the murder was committed immediately after a robbery and in the course of apprehension of the robbers by the police, the Trial Court was required to submit to the jury an instruction on second-degree murder. The majority held that such an instruction was not required on the facts there presented because they regarded the robbery as still in progress at the time of the murder.

Both the majority and minority of this Court in Coleman agreed, however, that in a felony-murder prosecution an instruction on second degree murder must be submitted to the jury "when the evidence so justified," following Stevenson v. United States, 162 U.S. 313 (1896). Both opinions also made it clear that even though no objection was made in the Trial Court to the failure to give such an instruction, the record would be examined on that issue, particularly because "a man's life is at stake." The Court divided, not because of disagreement on the applicable law, but because of disagreement on applying that law to the pertinent facts in that case. Thus we rely here on both the majority and minority opinion in the Coleman case.

On the question of when the evidence justifies such an instruction, the majority opinion in Coleman cited with approval the decision of this Court in Kinard v. United States, 96 F.2d 522 (1938). There, Judge Miller, speaking for the Court, pointed out that the omission of such an instruction will be noticed although not requested of the Trial Court. He also made clear that, following Stevenson v. United States, supra, and emphasizing the clear language of that decision, "if there be any evidence fairly tending to bear upon the issue," it became a question for the jury requiring an instruction on the lesser offense. This Court emphasized that all that was required, in the words of the Stevenson decision, was "some evidence upon the subject," "any evidence which tended to show such a state of facts. . ." (emphasis this Court's).*

Here we have a homicide and a robbery. If the homicide took place in the course of the robbery, it is a felony-murder, regardless of Appellant's intentions. Thus the question here presented is whether there is some evidence, any evidence, even if of most "dubious reliability," that the homicide preceded the robbery, and that it was subsequent to the homicide

* In a recent decision, Judge Burger, speaking for the Court, reaffirmed that however "implausible, unreliable or incredible" the testimony may be, and although it may be of "dubious reliability," the Trial Court was required to submit an instruction to the jury on the lesser offense, for "the question of its weight and credibility was for the jury." Young v. United States, 309 F.2d 662, 663 (1962). See also Hansborough v. United States, 308 F.2d 645 (1962) (affirming a conviction for second degree murder where the indictment charged first degree premeditated murder, and stating that because there was no way of "knowing definitively" the intent of the defendant when he shot the deceased, a second degree instruction was "required.")

that the Appellant determined to rob the store. If such evidence exists, the jury should have been instructed on second degree murder.

It respectfully is submitted that there is such evidence, as follows:

1. There is Express Testimony in the Record, that in the Opinion of a Qualified Expert in Psychology, Appellant did not Determine to Rob the Store until after the Murder.

Dr. John Endacott, a well qualified psychologist, on cross-examination by Government counsel and under questioning by the Court, was asked the following questions and gave the following answers:

> "Q Doctor, at what point was robbery one of his motives?
>
> "A I think you can only go by the evidence, and, presumably, some time after he shot the man.
>
> "THE COURT: Don't you think robbery was a motive at the time he pulled out the gun and said, 'This is it.'?
>
> "THE WITNESS: Not necessarily.
>
> "BY MR. HANTMAN:
>
> "Q What other explanation do you have for a man pulling out a loaded revolver and pointing it at somebody when they say, 'This is it.'?
>
> "A I suggested a little bit ago that I felt he was a frightened man responding to persecuting voices, quite possibly." (Tr. 1051)

The jury had the right to believe a part of his opinion, namely that the decision to rob was made after the murder, even if it chose to reject his speculation that the murder was motivated by some hallucination. The jury could have found that the

murder was committed by a primitive, impulsive, dull-witted man annoyed at some triviality (see p. 17, infra), who was not mentally ill in the legal sense, and still have accepted Dr. Endacott's opinion as to when the decision to rob occurred.*

That opinion alone, elicited by the Government, required submission of an instruction on second-degree murder to the jury. Moreover, that opinion finds support in the evidence of the crime itself and the evidence of the mentality of the Appellant (apart from the issue of mental responsibility).

2. The Evidence of the Crime Itself Raises the Question of Whether the Homicide Occurred During the Robbery or Before and Separate From It, and the Psychiatric Testimony Supports the Possibility of an Impulsive Killing Followed by the Robbery.

The undisputed evidence concerning the circumstances of the crime is as follows:

Appellant came into the store and stood around for between 10 and 15 minutes, making no effort at concealment (tr. 167), "leisurely" drinking soda pop and eating potato chips "as if he was enjoying what he was doing." (Tr. 136, 114-118). Appellant then asked for a second bottle of soda pop. He was informed by the deceased that the deceased preferred that he take the soda out because he wanted to close the store. Appellant paid for the soda and told the deceased to put it in a bag. (Tr. 138).

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* ". . . [I]t is elementary that the trier of facts need not discredit all the testimony of a witness because part of it is not believed." Pandolfo v. Acheson, 202 F.2d 38, 41 (C.A. 2, 1953); see also N.L.R.B. v. Universal Camera Corp., 179 F.2d 749, 754 (C.A. 2, 1950), vacated on other grounds, 340 U.S. 474 (1951).

It was while the deceased was putting the soda in the bag that the Appellant walked toward the center of the store, turned around with a gun in his hand, and said:

"This is it."

The Appellant did not say "This is a holdup" or "I want some money" or make any statement other than "This is it." (Tr. 171).

The deceased and his daughter, Mrs. Burka, were only 3 or 4 feet from the Appellant at this point, and looking directly at him. Mrs. Honikman immediately shouted to the Appellant: "There is the register; take the money." Then as Mrs. Burka described it:

> "I kept hollering at him, 'Take the money; take the money,' and my father kept saying, 'Do you want the money? Do you want the money? The man made no remark, nor did he change his expression, nor did he move forward or backward, but just fired a shot from his gun.'" (Tr. 181-182, see also Tr. 172, 177, 187, 140-41).

Through the point of the actual killing, therefore, Appellant said and did nothing in the store which would exclude the reasonable possibility that robbery was not then his intention. The killing patently was not necessary if robbery were the objective. Had he walked out of the store immediately after the killing, without robbing it, a conviction for felony-murder could not have been sustained.

Subsequent to the shooting Appellant demanded that Mrs. Honikman open the cash register (Tr. 192). The record

does not reveal exactly how much time elapsed after the murder before Appellant demanded that the cash register be opened.*

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* Mrs. Honikman testified, in response to a question of whether Appellant took anything after the shooting: "He told me to open the register, I should get the money . . . . And I told him, 'you killed my husband. Open the register yourself.' Then, you know, he held the gun just in front of me, and with his left hand he scooped out the money from the register." (Tr. 192). The time interval was not discussed in her testimony. The testimony of Mrs. Burka is ambiguous and somewhat self-contradictory. It does permit, under one plausible interpretation, the conclusion that there may have been some interval between the shooting and Appellant's demand that the cash register be opened. Mrs. Burka appears to have testified that at the time her mother told Appellant to open the cash register himself because he had killed her husband, Mrs. Burka knew that her father was dead because she felt no pulse (Tr. 168). She also had testified that she took his pulse after he fell into her arms, and after she gradually let him slide down to her feet in a sitting position, and after she had told her mother to get her coat to put under his head, and while her mother was getting the coat. (Tr. 141-43). This would require some time interval after the shooting before the demand to open the register. However, her description of the events in that connection was in response to a question relating to the events after the colloquy between Appellant and her mother and while Appellant was emptying the cash register. (Tr. 141-143). If the witness were in fact responding to that question, and if her testimony meant that she did not take her father's pulse until after Appellant was emptying the cash register (Tr. 142-143), this testimony was contradicted by her testimony on cross-examination that she knew her father was dead because she felt no pulse at the time when Appellant demanded and her mother refused to open the register (Tr. 168). Moreover, Mrs. Burka testified that she first saw Appellant over at the cash register after she had laid her father down, and her mother had returned with a coat to put under her father's head, and she had put the coat there and gotten up to hold her mother (Tr. 169). At that time he was pointing a gun at her and her mother and scooping the contents from the cash register with one hand. While the exact sequence is unclear, a jury could infer from Mrs. Burka's and Mrs. Honikman's testimony (Tr. 192) that the initial demand to open the register may not have been made until Mrs. Honikman had gotten the coat and was standing by her daughter who was placing the coat under the deceased's head.

Appellant was described as either mentally defective, or at best low normal (Tr. 943, 1267, 2044), and as an impulsive person who can readily react on the spur of the moment with extreme violence, and one explanation of the murder was precisely that type of conduct. (Tr. 1317, 1284). Other characterizations of Appellant and the crime were: "erratic behavior, impulsive action, poor judgment, loss of control. . ." (Tr. 1622); "a very impulsive type of act" (Tr. 1623); an "explosive, unprovoked outburst" (Tr. 1711); a "sudden outbreak of violence, seemingly unprovoked." (Tr. 1440). Government experts found Appellant to be a primitive person who acted spontaneously without thought, was childishly impulsive, had an uncontrollable temper, and who possibly was subject to uncontrolled, emotional outbursts. (Tr. 1885-86, 1954-55, 2050, 2061-62, 2107).

With this pattern, it was entirely possible for the jury to have reasonable doubts whether the decision to rob the store was made subsequent to the murder, and whether the murder was essentially the impulsive act of a primitive man who was annoyed at being told to leave the store, rather than being related to the subsequent robbery (Tr. 939, 1220, 1755). There "is no way of knowing definitively" when Appellant formulated his intent to rob, and on the facts of this case the time of the commencement of the robbery is determinative. Under Hansborough and Coleman, supra, the Trial Court was therefore required to submit an instruction on second-degree murder to the jury. It was for the jury to decide whether the murder was part of the robbery.

II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY WITH RESPECT TO THE ISSUE OF INSANITY

The substantive defense in the trial of this case rested entirely on the ground of insanity. For this reason, the instructions of the Trial Court on this issue were critically important, and the errors committed in the instructions were most prejudicial to the accused.

These errors were of two principal types: first, those relating to the burden of proof where the issue of insanity is raised; and second, those relating to the definition and explanation of the meaning of insanity.

A. The Trial Court Erred in Instructing the Jury as to the Government's Burden of Proof with Respect to the Issue of Insanity

It has been consistently recognized in this jurisdiction that once the accused has presented some evidence of insanity, the burden shifts to the Government to prove his sanity beyond a reasonable doubt. Davis v. United States, 160 U.S. 469 (1895), and numerous decisions of this Court. See, e.g., Blocker v. United States, 288 F.2d 853 (1961) and cases there cited. For this purpose, the Government must prove beyond a reasonable doubt either that the accused was not suffering from a mental disease or defect at the time of the offense, or that the disease or defect did not cause the crime. Unless the jury is correctly, clearly and consistently advised as to the Government's burden of proof, the instructions are necessarily erroneous and prejudicial.

The instructions on this point in the present case, taken as a whole, form a confusing pattern of correct and incorrect statements. These instructions, covering 8 pages in the transcript, might well leave even the most sophisticated of jurors uncertain as to the proper burden of proof.*

The Trial Court initially instructed the jury on this issue in general terms. While its instructions were correct, they required amplification in order to be applied properly by the jury. For this purpose, the Trial Court stated that it would provide "the rules" as to the issue of mental responsibility at a subsequent point in its instructions. (Tr. 2257-58).

In the course of stating those "rules," the Trial Court gave the following patently erroneous instruction:

> "If both questions /i.e., the presence of mental disease and the existence of productivity/ are answered in the affirmative, the defendant is not responsible for his criminal act. If either question is answered in the negative, then the defendant is responsible for his criminal act." (Tr. 2260) (Emphasis supplied) (Appendix A, p. 5a).

This instruction, which required affirmative findings of mental disease or defect and of productivity in order to

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* The entire charge on the insanity issue is reproduced as Appendix A of this brief. Trial counsel for Appellant, after first objecting to part of the instructions as placing the burden of proof on the insanity issue on the Appellant, did not pursue his objection after comment by the Court that burden of proof was covered fully (Tr. 2274-2275). Nevertheless the instructions are such that even had there been no objection, they should be considered by this Court as prejudicial and reversible error, and certainly no waiver on this basic issue should be attributed to Appellant. Tatum v. United States, 190 F.2d 612, 618 (App. D.C. 1951); Stewart v. United States, 214 F.2d 879, 882 n. 7 (1954).

relieve the defendant of criminal responsibility, was clearly inconsistent with the rule followed in this jurisdiction since the decision of the Supreme Court in Davis, and is comparable to the instruction which this Court held to be reversible error in Blocker v. United States, supra.

After several additional instructions on various aspects of the defense of insanity, the Trial Court again correctly, and this time extensively, stated the rule with respect to burden of proof. (Tr. 2261-63; App. A, p.5a-7a). However, it thereafter concluded its charge on the legal aspects of the insanity issue by reverting once again to an erroneous instruction on burden of proof:

> "The question whether the defendant at the time of the commission of the crime was suffering from a mental disease or mental defect and the question whether, if that be the case, the crime was a product of such mental disease or mental defect, is for the jury to determine. . . The jury must determine for itself, from all of the testimony, lay testimony and expert testimony, and you must consider both, whether a mental disease or defect existed and, if so, whether the crime was the product of that condition." (Tr. 2264; App. A, p. 8a).

The effect of this instruction, as of the prior erroneous instruction, was again to permit the jury to conclude that they might resolve the issue of insanity by a mere balancing of the evidence. This instruction was plainly incorrect. The jury must not "determine . . . whether a mental disease or defect existed, and, if so, whether the crime was the product of that condition," as the Trial Court charged. On the contrary, in the words of this Court, in Carter v. United States, 252 F.2d 608, 618 (1956):

> "Generally speaking, in order to return a verdict of guilty notwithstanding a defense of insanity, the jury must find (1) that beyond reasonable doubt the accused is free of mental disease; or, if the finding is 'No, he may have a mental disease,' then (2) that beyond reasonable doubt no relationship existed between the disease and the alleged criminal act which would justify a conclusion that but for the disease the act would not have been committed."

Thus, even if it were possible to argue that the effect of the correct and complete instruction might be to counterbalance the earlier error, the final instruction on this issue necessarily compounded the confusion and re-emphasized that error. As a result, the jury at best was left free to select the improper test.

This Court has consistently held that where the instructions, taken as a whole, are confusing, or where they combine accurate and inaccurate statements of the law in such fashion that the jury might have been guided by the inaccurate statement, the instructions must be reversed. The Blocker decision is particularly in point. In that case, the Trial Court gave three instructions as to the Government's burden of proof respecting insanity. The first and third instructions were correct; the second was erroneous. This Court reversed the conviction because of that error.

In the present case, the circumstances are far more compelling: the introductory instruction briefly and correctly states the general rules; the only correct and complete instruction on the specific application of those rules is bracketed by two clearly erroneous instructions, one of which

was the final instruction to the jury on the law governing the issue of mental responsibility.

In addition to the Blocker decision, this Court has held in numerous other cases that a combination of correct and erroneous instructions must be reversed. Thus, in Isaac v. United States, 284 F.2d 168, 171 (1960), this Court summarized the incorrect portion of the instructions and concluded:

> "It is true that the court correctly stated to the jury several times that the burden of proof was on the Government to establish beyond a reasonable doubt that the accused was not suffering from a mental disease or that the acts were not the product of a mental disease. The two conflicting views of the law, the erroneous and the correct, as to the burden of proof were repeated several times in this charge. We cannot speculate that the correct statements obliterated in the minds of the jurors the repeated erroneous statements. We recognize that the problems posed by the burden-of-proof rule in respect to the defense of insanity are somewhat difficult, but the rule of law is plain and absolutely certain. It should be made plain and certain to juries in such cases."

See also McFarland v. United States, 174 F.2d 538, 539 (App. D.C. 1949); Smith v. United States, 230 F.2d 935 (C.A. 6, 1956). The Court in McFarland invoked the rule laid down by the United States Supreme Court in Bollenbach v. United States, 326 U.S. 607, 613 (1946), that a "conviction ought not to rest on an equivocal direction to the jury on a basic issue."

In the present case, the only substantive defense was insanity. On that issue, in addition to numerous lay witnesses, 10 well qualified experts testified at length. Their

findings and opinions varied greatly. The Trial Court's charge as to the burden of proof on that issue was basic, and of overriding importance. The inconsistent combination of correct and erroneous instructions was necessarily prejudicial to the defense and requires reversal by this Court.

B. The Trial Court Erred in Instructing the Jury as to the Legal Test of Criminal Responsibility Because it Treated This Court's Statement in the McDonald Case as a Comprehensive Definition of "Mental Disease or Defect", Because it Did Not Explain to the Jury That What Psychiatrists Consider a "Mental Disease or Defect" for Clinical Purposes May or May Not Be Within That Judicial Definition of "Mental Disease or Defect", and Because it Did Not Explain the Meaning of "Product" of a "Mental Disease or Defect."

The legal test of insanity as a defense in criminal cases in this jurisdiction was clearly and succinctly stated by this Court in Durham v. United States, 214 F.2d 862, 874-75 (1954). The Court held that

> "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

In the decisions subsequent to Durham this Court has sought to explain the terms "mental disease or defect" and "product" in a manner which will help to clarify the role which the capacity of an accused to control his conduct should play in assessing his criminal responsibility. For example, in Carter v. United States, 252 F.2d 608, 617 (1956) the concept of "product" was explained in terms of a "but for," "causal" or "critical" relationship between the mental disease and the criminal act. The recent decision of this Court in McDonald v. United States, No. 16,304, F.2d (October 8, 1962),

sought to clarify the meaning of "mental disease or defect" by stating that

> "a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." (Slip opinion, p. 7).

Because the rules on mental responsibility often must be applied to extremely complex factual issues involving detailed expert medical testimony, this Court, in Carter, described the role of the Trial Court in instructing the jury on these matters as follows:

> "A trial judge faced with a defense of insanity in a criminal case ought not attempt to be brief or dogmatic. He ought to explain -- not just state by rote but explain -- the applicable rules of law and the duties of the jury in respect to the matter. He should explain not only in general terms but in terms applicable to the disease and the act involved in the case at bar. Because, after all, the jury must make its findings upon the facts in the case before it, not in some nebulous generality of supposition." (252 F.2d at 618).

The issues here are whether the Trial Court properly interpreted McDonald, and whether the Trial Court's failure to explain the applicable rules on criminal responsibility, as required by Carter, resulted in an erroneously confusing instruction.

1. The Trial Court Erred in Defining Mental Disease or Defect as Meaning Only Those Abnormal Conditions of the Mind Which Substantially Affect Mental or Emotional Processes and Substantially Impair Behavior Controls and as Excluding all Other Abnormal Conditions of the Mind.

As noted above, this Court, in McDonald, stated that:

> "a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially

impairs behavior controls." (Slip opinion, p. 7; emphasis supplied).

The Trial Court, in its charge on this issue, as set forth at pages 4a to 5a of Appendix A, used the McDonald language 4 times, except that in place of the word "includes" it substituted "is" the first time, and "must be" the third time, and used language to the same effect as "is" or "must be" the fourth time (Tr. 2260-61). The clear effect of these instructions was to treat the McDonald decision as presenting a total definition of "mental disease or defect" which would exclude any abnormality not within its purview. Appellant objected to this aspect of the instructions (Tr. 2275). Thus, the question here presented is whether that interpretation of McDonald is what this Court then intended or now desires.

We respectfully submit that these instructions are erroneous and the McDonald language should not be construed to reach such a result. There may well be instances where an "abnormal condition of the mind" does not "substantially affect mental or emotional processes" or does not "substantially impair behavior controls," yet the crime may nevertheless be the "product" of that abnormality. For example, it could readily be concluded that an individual who committed a crime during and in consequence of an insane delusion, but who nevertheless exhibited full capacity to choose the time and manner of committing the offense, did not suffer from any substantial impairment of his behavior controls. This could be particularly true if the criminal act constituted proper behavior within the context of the delusion. In Carter v. United States, supra, this Court specifically stated:

> "Durham was intended to restrict to their proper medical function the part played by the medical experts. Many psychiatrists had come to understand there was a 'legal insanity' different from any clinical mental illness. That of course was not true in a juridical sense. The law has no separate concept of a legally acceptable ailment which per se excuses the sufferer from criminal liability. The problems of the law in these cases are whether a person who has committed a specific criminal act -- murder, assault, arson, or what not -- was suffering from a mental disease, that is, from a medically recognized illness of the mind; whether there was a relationship between that specific disease and the specific alleged criminal act; and whether that relationship was such as to justify a reasonable inference that the accused would not have committed the act if he had not had the disease." (252 F.2d at 617)

The Trial Court's interpretation of McDonald in effect would repudiate this portion of the Carter decision. We assume that, consistent with Carter, this Court in McDonald was not attempting to provide an all-inclusive definition of mental disease or defect, but rather was attempting to help clarify the meaning of those terms by an explanation or partial definition. Undoubtedly this is why the Court carefully chose the word "includes" to introduce this explanation.

The Trial Court's error could have had a major impact on the jury's considerations. The expert medical testimony in this case covered a wide range of "diseases," "defects," and borderline situations, including a possible hallucination at the time of the crime (see e.g., Tr. 1051). By providing an absolute formulation for mental disease or defect which included such concepts as substantially affecting mental or emotional processes and substantially impairing behavior controls, the Trial Court may very well have prohibited the jury

from considering certain testimony as sufficient to establish a reasonable doubt as to the Appellant's mental responsibility.

2. The Trial Court did not Explain to the Jury That What Psychiatrists Consider a "Mental Disease or Defect" for Clinical Purposes May or May Not be Within the Judicial Definition of "Mental Disease or Defect"

During the trial, the Trial Court properly permitted the expert and lay witnesses to be examined on the issue of mental disease or mental defect without requiring that the witnesses limit their opinions to the definition of mental disease or defect set forth in the McDonald case. Throughout the trial, numerous witnesses expressed opinions on whether Appellant was suffering from a mental disease or defect without those terms being defined, and in fact without any express reference to the judicial definition. There is nothing in the record to indicate that they even were aware of that definition, and it is a fair assumption that their opinions were based on their usual clinical standards.

At the conclusion of the evidence, as noted above, the Court, in its instructions to the jury, treated the McDonald formulation as a comprehensive and all-inclusive definition of "mental disease or defect." (App. A, p.4a-5a; Tr. 2260-61): The jury was instructed that it was not "controlled" by the expert opinions, and that the issues of mental responsibility were for its determination (App. A, p. 8a ; Tr. 2264). The Court, however, did not tell the jury that, as this Court pointed out in McDonald:

> "What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility." (Slip opinion, p. 7).

The failure to give the jury this essential guidance, without which the jury had no way of knowing that medical and judicial standards might not be identical, was compounded by the manner in which the Trial Court summarized the evidence. The Trial Court pointed out the conclusions of the expert witnesses on mental disease or defect. (App. A, pp. 14a-15a ; Tr. 2270-71). Since the Trial Court did not explain to the jury that these expert witnesses may have been using the terms "mental disease or mental defect" with an entirely different meaning than that set forth in the judicial definition, the jury could and naturally would assume that the same terms, when repeated within a few moments in the instructions, were being used with the same meaning throughout.

A cursory examination of the testimony of the Government's experts illustrates the great prejudice to Appellant which may have resulted from this error. One Government witness, Dr. Cavanagh, specifically testified that when he stated that Appellant did not have a mental disease or defect, he meant that Appellant "did not have any illness or defect that would be classifiable as mental illness." (Tr. 1960, emphasis supplied). Dr. Cavanagh found that Appellant was a "primitive sort of person." He defined such a person as one who "acts out his conflicts, doesn't stop to think"; his actions "come

out spontaneously, acted out, there is no thinking." He said that such acting out did not necessarily establish mental illness. (Tr. 1954-55).

From this testimony it is obvious that while Dr. Cavanagh did not classify Appellant as mentally defective or diseased in a clinical sense, the jury could nevertheless conclude that those aspects of Appellant's make-up described by Dr. Cavanagh, together with the other evidence, raised a reasonable doubt as to the existence of a mental abnormality which affected mental or emotional processes and impaired behavior controls. In that connection the jury also might have considered the testimony of Government witness Dr. Klein, that Appellant was of limited intellect but "not mentally defective, in the formal sense of the term" (Tr. 2105) and his opinion that Appellant was capable of "a childish type of impulsive behavior" (Tr. 2107), as confirming that doubt. The jury might have found further confirmation in the testimony of Government witness Dr. Platkin, that Appellant might be moderately mentally deficient, that he doubted that Appellant was malingering in a St. Elizabeth's Hospital Rorschach test which indicated that Appellant may be subject to "uncontrollable, emotional outbursts," and that Appellant might have an "ungovernable temper" which might be "uncontrollable with respect to the incident." (Tr. 2045, 2061-62, 2050).

The Trial Court flatly informed the jury in its instructions that Doctors Cavanagh, Platkin, and Klein had concluded that Appellant did not have a mental disease or defect (App. A, pp. 14a-15a; Tr. 2270-71). The jury inevitably must have

assumed that these distinguished experts, applying the same definition of mental disease or defect as the jury was required to utilize, had considered all facets of Appellant's make-up, and concluded that there was no mental disease or defect. Had the jury realized that these experts may have been using different standards of mental disease or defect, the jury, in its de novo approach to this issue, well may have had a reasonable doubt. This is particularly true in view of the extensive expert testimony introduced by Appellant on this issue.

3. The Trial Court Did Not Explain the Meaning of "Product" of a "Mental Disease or Defect," Including Its Relationship to "Substantial Impairment of Behavior Controls."

The Trial Court declined to define "product," as used in Durham and Carter, and to relate it to the McDonald definition of mental disease or defect. (Tr. 2275-76). It did not relate any of its instructions on insanity to the evidence. On the contrary, by a rote presentation of the Durham and McDonald formulations (and incorrectly in the latter case), the Trial Court presented a confusing instruction which was highly prejudicial to the Appellant. The Trial Court, in pertinent part, instructed the jury as follows:

> "Unless /the accused's/ abnormal condition of the mind substantially affects mental or emotional processes and, in addition, substantially impairs behavior controls, it is not regarded by the criminal law as a mental disease."

It thereafter immediately advised the jury that:

> "In addition to being afflicted with a mental disease or defect, within the definition that I have just given you, in order that the defendant may not be deemed mentally responsible for his criminal act the crime itself must be the product of that mental disease or of that mental defect." (Tr. 2261; emphasis supplied; App. A, p. 5a).

This instruction required the jury to consider behavior controls twice: first, as part of the definition of mental disease or defect, and second, in considering productivity, which by definition would involve the issue of impairment of behavior controls. By requiring that the jury consider impairment of behavior controls as an element of mental responsibility wholly separate from productivity, and by leaving "product" undefined, the Trial Court permitted the jury to conclude that to come within the definition of insanity in criminal cases, the abnormality must have caused impairment of behavior controls on occasions other than during the commission of the crime.

When the Trial Court utilized the new language of McDonald, it could not leave "product" undefined, but was required to integrate the various elements of mental responsibility into a consistent, clear instruction. If the Trial Court's charge on this matter is allowed to stand uncorrected, wholly apart from permitting the death penalty to rest upon an erroneous instruction, it may have very wide repercussions with respect to the insanity defense. It is well known that even persons with serious mental disorders or defects can conduct themselves over an extended period of time in what appears to be a substantially rational and normal manner. However, the disorder or defect very well may result in one cataclysmic explosion

in which a brutal crime is committed. Unless the jury is informed that substantial impairment of behavior controls at the time of the crime, resulting in its commission, meets both the "productivity" and the "substantial impairment" requirements, the jury could erroneously conclude that, absent a history of irrational behavior, it would not be permitted to find a defendant not guilty by reason of insanity. Inevitably this would result in imposing criminal responsibility upon those who, even under the law before Durham, were consistently found not culpable.

III. THE TRIAL COURT'S SUMMARIZATION TO THE JURY OF THE EVIDENCE ON THE ISSUE OF INSANITY WAS INACCURATE, INCOMPLETE, AND MISLEADING, SO THAT THE TRIAL COURT BECAME, IN EFFECT, AN ADVOCATE OF THE PROSECUTOR'S CONTENTIONS.

Within the cloak of judicial impartiality, the Trial Court recited to the jury what purported to be a fair summary of the evidence on the issue of insanity. Through a process of misstatement, understatement, and insertion and omission of modifying facts, Appellant's case was minimized. By giving a more full description of the Government's case, and by the omission of modifying facts, the Trial Court presented the Government's contentions as to the evidence in an orderly and persuasive manner.

While the Trial Court correctly informed the jury that it was their "view of the evidence that must prevail" (Tr. 2264-65), it also told the jury that one of the Court's functions was "to summarize the evidence" in order "to aid and assist the jury in arriving at its conclusions. . . ." (Tr. 2246). The jury undoubtedly expected, and Appellant had a

right in such circumstances to receive, a fair and accurate summary of the evidence.

The Trial Court's summary of the evidence was far more devastating to Appellant than a straightforward statement of the Court's opinion would have been, because the jury had a right to assume it was an objective presentation. The Court in effect became an advocate of the Government's case in the manner most likely to succeed -- restrained, temperate, apparently judicious, but nevertheless substantially misleading. This was reversible error. As the Court of Appeals for the Tenth Circuit has stated:

> "The trial judge undertook to sum up and comment on the evidence. He narrated the important facts testified to by witnesses for the government but he wholly failed to sum up the evidence in behalf of Minner. His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of an advocate rather than an impartial judge. That this was error is established by repeated decisions." Minner v. United States, 57 F.2d 506, 513 (1932).

The only way adequately to demonstrate the error committed by the Trial Court is to analyze its summary of the

evidence, pointing out item by item what was misstated, understated, or omitted; we have done this in Appendix B to this brief.*

As the Supreme Court stated in Starr v. United States:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." 153 U.S. 614, 626 (1894).

That the Trial Court here was not vociferous and argumentative, as the Trial Court was in the Starr case, but accomplished the same result in a more subtle manner, in no way negates the error or the prejudice to Appellant. As Lord Chancellor Bacon stated it, a judge must "be a light to jurors to open their eyes, but not a guide to lead them by the noses." (quoted in Smith v. United States, 2F.2d 919, 921, App. D.C., 1924).

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* While quantity alone hardly would be decisive, this Court may nevertheless obtain some concept of the magnitude of the error when it realizes that Appellant's proof on the issue of insanity, which covered some 1,350 pages of the record, was summarized by the Trial Court in one and three-quarter pages of its instructions (which also included mention of some of the Government's countervailing evidence), and that the Government's proof, which, directly on the insanity issue, covered only 350 pages of the record, and in toto, including all evidence of the crime, covered only 675 pages, was given four and one-half uninterrupted pages in the Trial Court's summary of the evidence on insanity. Cf. Wheeler v. United States, 165 F.2d 225, 228, (App. D.C. 1947) cert. denied 333 U.S. 829.

Appellant's 850 pages of expert medical testimony, where 5 psychiatrists and 1 psychologist testified at length, was summarized in less than a page. It was summarized in a manner which was not informative but which highlighted the differences in the diagnostic labels, without pointing out the numerous consistencies in the significant findings on mental and emotional processes and behavior controls.

IV. THE TRIAL COURT ERRED IN REQUIRING APPELLANT'S COUNSEL TO PRODUCE AND INTERROGATE ALL AVAILABLE WITNESSES ON THE ISSUE OF INSANITY

The Trial Court entirely deprived defense counsel of his discretion on whether to call and interrogate certain witnesses on the issue of insanity. This is not a matter of burden of proof, or of order of proof, which initially were involved below in the consideration of this matter. The issue solely is whether the Trial Court may order defense counsel to produce all evidence available to the defense on the issue of insanity, thereby depriving defense counsel of his right to decide which witnesses, if any, he would call.

This issue arose below in the following manner. At the conclusion of the lay testimony on the insanity issue presented by the defense, counsel for the defendant advised the Court that he would "rest on the offer we have made for the purpose of raising the issue." (Tr. 874). The Court, after discussing the distinction between order of proof and burden of proof in a case involving insanity, ruled, contrary to an earlier comment on this question (Tr. 6), that the defense must "exhaust" its proof on that issue as part of its case in chief, although it would still be entitled to its rights in rejoinder. (Tr. 883). In a subsequent bench conference, the Court stated that it was requiring the defense to produce, as part of its case in chief, all the witnesses that it intended to produce at any time on the issue of insanity. (Tr. 890-91).

At that point the defense offered to rest without producing any such witnesses. It was then that the error complained of occurred. The Court refused to permit the defense to rest, and directed defense counsel "to produce all of the evidence that you have available on the issue of insanity." (Tr. 891-2). Defense Counsel immediately moved for a mistrial on the ground that the Court had by its ruling deprived the defendant of adequate representation by counsel. (Tr. 892-94). The Court denied the motion (Tr. 894), and the defense thereupon proceeded to call its first expert witness.

After the witness had been questioned and excused, defense counsel renewed his motion for a mistrial on the ground that he had been compelled to produce the witness against his judgment. (Tr. 1101). The motion was denied. (Tr. 1101). Defense counsel, in order to make the record entirely clear that the ruling of the Court deprived him of all discretion with respect to the production and interrogation of witnesses, stated that he would produce no further witnesses on the issue of insanity unless compelled by the Court to do so on pain of contempt (Tr. 1102). He also stated that he would not interrogate any such witnesses except on the same basis (Tr. 1103). The Court thereupon compelled him

> "to produce all the available evidence in your possession, on the issue of insanity, under pain of punishment for contempt." (Tr. 1103)

The Court also ordered defense counsel, on pain of contempt, to interrogate these witnesses (Tr. 1104). In view of these rulings by the Court, the defense was compelled to present the remainder of its evidence on the issue of insanity.

At the conclusion of the trial, the defense filed motions in arrest of judgment and for a new trial on the ground (insofar as is relevant to the present issue) that the Court had by the foregoing rulings deprived the defendant of adequate representation by counsel. Both of these motions were denied (Tr. 2293). Appellant submits that, on these facts, the rulings of the Trial Court deprived him of a fair trial, in that they usurped the proper function of defense counsel by precluding him from exercising his discretion in matters of trial strategy and particularly with respect to the selection and presentation of his evidence.

The Federal courts long have recognized the right of counsel, within the limits of orderly procedure, to conduct the trial of a case in the manner which he believes will best serve his client's interest. This Court itself has so held on numerous occasions in cases involving the discretion of the prosecution to choose which of its witnesses it will call. Thus, in Williams v. United States, 20 F. 2d 269, 270 (1927), this Court held:

> "There is no obligation resting upon the district attorney, in the trial of a defendant indicted for murder in the second degree, to call a witness under subpoena for the prosecution to testify ... In the ordinary criminal trial, the district attorney is entitled to pursue and elaborate his theory of the case, and to exercise his

> own judgment as to the witnesses to be called. In determining what testimony shall be adduced, his judgment is not to be challenged or interfered with, so long as the rules of evidence and procedure are complied with, and there is nothing in either which required the district attorney in the present case to call a particular witness to testify merely because his name was indorsed upon the indictment."

See also Jordon v. Bondy, 114 F. 2d 599, 604 (App. D.C., 1940); Curtis v. Rives, 123 F. 2d 936 (App. D.C., 1941); Sanford v. United States, 98 F. 2d 325, 328 (App. D. C., 1938).

The discretion of the prosecution as to which witnesses to call was upheld in these cases even though questions could conceivably arise as to whether essential evidence was thereby suppressed or whether the accused was deprived of his constitutional right to confront the witnesses against him. Since neither of these risks is presented where the defense counsel is exercising his discretion as to which witnesses to call, these decisions apply a fortiori. In that connection, the Federal courts have recognized this discretion on the part of defense counsel even where the defendant himself has subsequently challenged his attorney's judgment. See United States v. Gutterman, 147 F. 2d 540 (C.A. 2, 1945), followed in Lewis v. Sanford, 79 F. Supp. 77, 78 (N. D. Ga., 1948), where the court stated that "An attorney may exercise judgment in the matter of witnesses to be called in support of a defense..."

The question of which witnesses should be called to testify is an essential part of trial strategy. As stated

by the Court in United States v. Curcio, 279 F. 2d 681, 682 (C.A. 2, 1960), the Trial Judge should not "take the course of the trial out of the hands of competent attorneys." The same principle was recognized by the Texas court in Wright v. State, 1 S. W. 2d 1095, 1096 (Tex. Crim. Appls, 1928), where the court of appeals stated that "The [trial] court, of course, could not direct whom appellant would place upon the stand as witnesses." See also People v. McCrasky, 309 P. 2d 115, 118 (1957) where the California court expressly stated, citing prior decisions, that "neither side was required to produce all witnesses who might be able to testify so long as there is fairly presented to the court the material evidence bearing upon the charge for which the accused is on trial." (emphasis supplied)

If the Trial Court had ruled merely that the defense must either produce its expert testimony as a part of its case in chief or be limited to strict rejoinder testimony, it would require a compelling showing of abuse of discretion by the Court to ground a reversal. But the ruling in this case extended far beyond the question of the orderly conduct of the trial. The Court expressly and unequivocally directed the defense to produce all evidence in its possession on the issue of insanity. By its action, therefore, the Court effectively took the course of the Appellant's case out of the hands of defense counsel.

Much more is at issue here than merely the question whether the defense was unduly disadvantaged because the

jury did not hear its witnesses last. By depriving defense counsel of his fundamental right to decide what testimony would best serve the defendant's interest, the Court compelled counsel to call six medical witnesses, each of whom differed from the others in his diagnosis of the defendant's mental condition. It is quite possible that the benefit to the defense resulting from the concurrence of these witnesses as to the existence of a mental abnormality was substantially outweighed by the adverse effect on the jury in consequence of the widely differing diagnoses. The Government's argument to the jury (Tr. 2198-2200) and the Trial Court's instructions (Tr. 2266-2267), both of which call attention to the divergent diagnoses, together with portions of the Government's cross-examination, all indicate that this risk was very real. The refusal of the Trial Court to permit counsel to exercise his discretion thus was prejudicial error.

The Trial Court's action also deprived Appellant of the effective assistance of counsel guaranteed by the Sixth Amendment.

> "We think that the right to the effective assistance of counsel contemplates the guiding hand of an able and responsible lawyer, devoted solely to the interest of his client; who has ample opportunity to acquaint himself with the law and facts of the case, and is afforded an opportunity to present them to a court or jury in their most favorable light." Willis v. Hunter, 166 F.2d 721, 723 (C.A. 10,1948), cert. denied, 334 U.S. 848.

The Trial Court's ruling replaced the "guiding hand" of counsel with the direction of the Court, resulting in a presentation which may not have been "most favorable" to Appellant.

V. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT FIRST DEGREE MURDER CARRIES A MANDATORY DEATH PENALTY UNLESS THE JURY UNANIMOUSLY RECOMMENDS LIFE IMPRISONMENT, FAILED TO INSTRUCT THAT UNANIMITY WAS ALSO REQUIRED FOR THE JURY TO FIX THE CAPITAL PENALTY, AND OMITTED ANY EXPLANATION OF THE JURY'S DISCRETION WITH REGARD TO PENALTY.

The applicable statute, enacted in 1962, provides as follows:

> "The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment." P.L. 87-423, 87th Cong., 2d Sess., 76 Stat. 46 (March 22, 1962).

Under this statute the verdict of the jury as to sentence must be unanimous as to the death penalty or unanimous as to life imprisonment or, if not unanimous as to either, it must be a report of disagreement, which requires the Trial Court to decide the question and impose a sentence of either death or life imprisonment as he in his discretion sees fit.

The Trial Court's entire charge on the subject of punishment for first degree murder was as follows:

> "A new law that was enacted only last March, March 1962, provides that the punishment of murder in the first degree shall be death by electrocution, unless the jury by unanimous vote recommends life imprisonment. Consequently, if the jury finds the defendant guilty of murder in the first degree and does not add any recommendation, it is mandatory on the Court to sentence the defendant to capital punishment. On the other hand, if the jury adds to its verdict a recommendation that the defendant be punished by life imprisonment, then it becomes the

> duty of the Court to sentence the defendant to life imprisonment. Such a recommendation, however, must be made by unanimous vote. If the jury finds the defendant guilty, but is not unanimous on the question as to whether a recommendation of life imprisonment should be made, then the jury must inform the Court that, while it finds the defendant guilty, it is not unanimous on the question of punishment." (Tr. 2253-4)

This instruction embodied three errors, two of commission and one of omission, which were cumulative in their prejudicial effect.

(i) The charge quoted the first part of the statute, up to the semi-colon. The Trial Court followed his partial quotation of the law with an explanation that "if the jury. . does not add any recommendation, it is mandatory on the Court to sentence the defendant to capital punishment." This is not the law. Such a sentence is mandatory only if the jury neither adds a recommendation nor reports failure to agree on punishment.

The jury could not misunderstand these instructions. They were told that nothing short of their unanimity on life imprisonment could save the defendant, once convicted of first degree murder, from death in the electric chair. They were led to believe that sentence mandatory regardless of whether they were unanimous as to the death penalty.

Under these instructions, the jurors may have believed, and probably did believe, that even if one or two, or even eleven of them concluded that life imprisonment was the appropriate punishment, their views could be of no effect so long as one determined juror held out for the death penalty. Of course, the Trial Court told the jury it should

report disagreement as to punishment. But he said nothing to counteract the impression that death was mandatory under that verdict. It is unrealistic to expect jurors, who have been instructed that only a unanimous verdict recommending life imprisonment could save the defendant, to give up the comforting cloak of unanimity and report a disagreement which can have no affect on a defendant's fate.

(ii) The Trial Court's instructions regarding unanimity aggravated his already reversible error. These instructions were directed exclusively to the necessity of unanimity in recommending life imprisonment, and wholly failed to state that a verdict of "Guilty as charged" required unanimous agreement that the penalty should be death. He quoted the statute: ". . . unless the jury by unanimous vote recommends life imprisonment." He explained that recommendation: "Such a recommendation, however, must be made by unanimous vote." He referred to the possibility of disagreement: ". . . but is not unanimous on the question as to whether a recommendation of life imprisonment should be made . . .". And, just before the jury retired, he said,

> "As of course you are aware, your verdict must be reached by unanimous vote, except as to an agreement on the question of punishment." (Tr. 2272)

It is perfectly clear that the same unanimity must exist for verdicts of "Guilty as charged" and "Guilty as charged, with a recommendation of life imprisonment." Failure to make this clear in the charge required reversal in Andres v. United States, 333 U.S. 740 (1948), and

requires reversal here.

(iii) The jury should have been instructed regarding its discretion as to punishment. The court below said nothing more than that the jury might, by unanimous vote, recommend life imprisonment. While this contained no affirmative error, it is terse to a fault. The jury should always have, and in this case particularly needed, an explanation of the law, which is that the choice of penalty is completely within their discretion, and the law neither approves nor disapproves any factors which might influence their choice. Winston v. United States, 172 U.S. 303, 307 (1899).

An instruction to this effect seems to be required in New Jersey. In re Ernst's Petition, 294 F.2d 556, (3d Cir. 1961). It is highly desirable in all cases, but under some circumstances is an absolute necessity. In Austin v. United States, 208 F.2d 420 (5th Cir. 1953), for example, the jury had been correctly told that voluntary intoxication could not be considered as defense to a murder charge. But, under Winston, the jury may consider intoxication when determining sentence. The court held a brief statement of the jury's discretion inadequate, and a full explanation required, to counteract the jury's possible impression that they must treat intoxication as wholly irrelevant.

In the present case, the jury similarly needed a full explanation of its discretion regarding punishment.

The Trial Court's charge that:

> "There are many abnormal persons or persons afflicted with mental deficiencies or suffering from personality disorders or mental disorders whom the law, in certain instances, holds responsible for certain crimes that such a person may commit." (Tr. 2259)

suggested, contrary to Winston, that emotional disturbance and mental deficiency could be considered only as they bore on the insanity question. An additional instruction was required to erase the erroneous impression so engendered, particularly since mental retardation and aberration not rising to the level sufficient to avoid criminal responsibility may be among the most compelling reasons for favorable excercise of the jury's discretion.

VI. THE TRIAL COURT ERRONEOUSLY FAILED TO INQUIRE ON VOIR DIRE WHETHER ANY PROSPECTIVE JURORS CONSCIOUSLY FAVORED CAPITAL PUNISHMENT IN MURDER CASES, ALTHOUGH HE HAD INQUIRED INTO AND TREATED AS DISQUALIFYING ALL SCRUPLES AGAINST THAT PENALTY.

It has long been the law in this jurisdiction that:

> "[T]he necessary test of the qualification of jurors in a trial of murder is that they shall have no bias in favor of or against either form of punishment.
>
> They should stand indifferent between the Government and the accused on this as in all other questions involved in the case." Funk v. United States, 16 App. D. C. 478, 487-88, cert. denied 179 U.S. 683 (1900).

At the commencement of the voir dire the Trial Court, sua sponte, dismissed all prospective jurors admitting any conscientious scruples against the death penalty. Neither

then, nor subsequently when Appellant requested such question, did the Trial Court propound any question designed to reveal bias in favor of capital punishment. While the question requested and denied was, perhaps, somewhat lacking in clarity, it was certainly adequate to appraise the experienced trial judge of its purpose.*

Justice and logical consistency require that a presiding judge make equal efforts to identify all prospective jurors who might not "stand indifferent between the Government and the accused." Regardless of what degree of predisposition for or against either penalty requires dismissal of any juror, cf. Stroud v. United States, 251 U. S. 330 (1920), the standard must be applied impartially to both forms of bias. The Trial Court's immediate elimination of all jurors admitting one form, coupled with his refusal even to inquire as to the other, was in patent disregard of the requirement set out in Funk v. United States, supra, and approved in the "exhaustive, scholarly opinion" in United States v. Puff, 211 F2d 171 (2d Cir.), cert. denied, 347 U. S. 963 (1954), relied upon by this Court in Turberville v. United States, 303 F2d 411, cert. denied, 370 U. S. 946 (1962).

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* "Have you ever expressed disappointment or disapproval when a person convicted of a very atrocious crime has escaped the death penalty"? The Trial Court did ask, at Appellant's request, "Has any one of you ever expressed any views on the subject of capital punishment"? (Tr. 35, 49, J.A.).

This Appellant is not complaining, as Turberville was, that jurors who might have favored the less severe penalty were excluded. Appellant complains of the Trial Court's refusal to exclude, or even to identify, jurors who might have had an unshakable bias in favor of the death penalty. Such jurors exist. They were identified on voir dire in Stroud and Puff, supra, and were held challengable for cause.

The jury which convicted Appellant may well have included persons who did not "stand indifferent between the Government and the accused," who refused to consider any penalty other than death. Patently this constitutes reversible error. In view of the recently enacted statute requiring a unanimous vote for a jury to recommend life imprisonment in a first-degree murder case, the risk that there may have been even one juror who was not impartial on this issue is too great to allow the conviction and death penalty to stand.

The Trial Court not only failed to inquire even-handedly into bias favoring as well as bias opposing capital punishment. He refused outright, over defense counsel's protest, to follow the "better practice" which this Court had in its supervisory capacity urged upon him,

> "to proceed one more step in this questioning on voir dire to ascertain in general terms the weight of the opposition the juror entertains, when measured against his ability to

render a fair and impartial verdict in the case on trial, based upon the evidence presented in that case and the law applicable thereto." Turberville, supra, 303 F.2d at 421. See also the concurring opinion of Judge Washington, 303 F.2d at 422.

This Court recognized in Turberville that conscientious scruples against the infliction of the death penalty, except in extreme cases where, perhaps, they reach the level of an "unshakable religious conviction as stark as an Old Testament Commandment," 303 F.2d at 419, do not disqualify jurors in capital cases. This is particularly true in view of the new statute under which the jury's discretion to recommend life imprisonment as the penalty for first degree murder is absolute. Winston v. United States, 172 U. S. 303 (1899). If, for example, a juror felt that infliction of the death penalty on a mentally retarded defendant was morally unjustifiable, the decision as to penalty could properly reflect that belief. The law "commits the whole matter . . . to the judgment and the consciences of the jury." Winston v. United States, supra, 172 U. S. at 313. A "conscientious scruple" so conditioned should be revealed to assist counsel in exercising peremptory challenges. But, under Winston and Turberville, it justifies neither challenge for cause nor summary dismissal.

It should be noted that the Trial Court's single question to the jury on this subject was ambiguous in that it referred to conscientious scruples "under any circumstances," as distinguished from "under all circumstances."

It did not ascertain, even "in general terms," the weight of the opposition the responding jurors entertained. While this Court might be reluctant to make its admonitions effective at the cost of reversing an otherwise unimpeachable conviction, it should not tolerate the District Court's disregard of such guidance where the voir dire and the trial also were deficient in numerous other aspects.

VII. THE ACTION OF GOVERNMENT COUNSEL, IN EXCLUDING ALL MEMBERS OF THE NEGRO RACE FROM THE JURY BY MEANS OF PEREMPTORY CHALLENGE, DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL.

Appellant in this case is a Negro. He was tried and convicted by a jury consisting entirely of persons of the white race. This composition of the jury was directly attributable to the fact that the Government exercised 16 of its 18 peremptory challenges to exclude Negroes. Government counsel challenged 17 prospective regular jurors and one prospective alternate. Only two of these 18 challenges were directed against white persons. (Tr. 128-129, 54-65) One of these two individuals was personally acquainted with defendant's counsel (Tr. 22) and would quite naturally have been challenged for that reason.

On this record, it clearly appears that the government systematically and successfully sought, by the use of its peremptory challenges, to exclude Negroes

from the jury.* Defense counsel moved to discharge the jury and declare a mistrial on precisely that basis. The Trial Court denied the motion (Tr. 71-73).

The law is entirely clear that the administrative exclusion of Negroes from panels of prospective jurors, solely on account of their race, constitutes the denial of a fair trial to a Negro defendant. See Eubanks v. Louisiana, 356 U. S. 584 (1958) and cases there collected. There is no question that this protection is assured to an accused in equal measure by the Fifth Amendment. Hall v. United States, 83 App. D.C. 166, 168 F.2d 161 (1948).

The deliberate exclusion of Negroes from the jury by means of peremptory challenge constitutes as prejudicial a denial of due process as if their exclusion had been accomplished at the prior stage of administrative selection. The fundamental guarantees of the Fifth Amendment are designed to safeguard the rights of the accused irrespective of the form in which they may be threatened. It is for this purpose that the Federal courts have held that discrimination in the selection of prospective jurors constitutes a violation of due process.

* At a bench conference during the trial, Government counsel asserted his recollection that he had declared himself satisfied with the jury on at least two occasions when its membership included at least one Negro (Tr. 128). The transcript provides no other information on this point. Assuming the accuracy of counsel's memory, this circumstance suggests no more than that in two instances the Government was prepared to accept a jury containing at least one Negro member. It is not in any way inconsistent with the conclusion that the Government, in the exercise of its challenges, systematically sought to exclude members of that race, nor did Government counsel specifically deny that this was his intention (Tr. 71-73, 128-34)

Since discrimination in the selection of the jury itself is equally prejudicial to the accused, it should equally be held a violation of due process. As Judge Edgerton stated in his dissent in Hall v. United States, supra:

> "The quoted cases involved systematic exclusion of Negroes or other groups from jury lists or panels. But the spirit and purpose as well as the letter of those cases forbid systematic exclusion of Negroes from a jury that tries Negroes. The rule against excluding Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury . . ." (p.166)

We are aware of the traditional rule that the peremptory challenge may, by its very nature, be arbitrarily exercised. This is a necessary and important principle, for the peremptory challenge serves a useful purpose. But we submit that its proper purpose will be equally well served, and its excesses confined, if it is employed in accordance with the paramount prescriptions of due process. If, as the Trial Court in this case suggested (Tr. 72), the prosecutor chooses arbitrarily to challenge all red-headed jurors, there is no consideration of due process to prevent him; but the attempt to strike all Negro jurors on the ground of race alone, in a case where a Negro is on trial, presents a very different issue. The one is a proper, if capricious, exercise of a trial technique universally recognized in our judicial system; the other is the deliberate transgression of a constitutional right. Merely because both are arbitrary, it does not follow that no distinction should be made between them.

For these reasons, we urge that this Court reconsider the view of the majority expressed in Hall v. United States. The majority in that case was entirely correct in stating that the "Constitution does not require that the appellants, being Negroes, should be tried by a jury composed of or including members of that race." (p.164) But this proposition does not meet the essential issue. Although the Constitution obviously does not require the inclusion of Negro jurors, it nevertheless should be held to require that the prosecution not discriminate by systematically excluding them. It is not inherently more difficult, and in some instances it may be easier, to determine whether discrimination exists in the use of the peremptory challenge than in the administrative selection of prospective jurors. In any event, we submit that in this case, where Government counsel obtained an all-white jury by directing 16 of his 18 challenges against Negroes, the discrimination is apparent and requires reversal.

VIII THE PROSECUTING ATTORNEY COMMITTED REVERSIBLE ERROR IN HIS SUMMATION (1) BY IMPLYING THAT APPELLANT'S DEMEANOR IN THE COURTROOM, APPELLANT NOT HAVING TESTIFIED, WAS IN ISSUE AND SHOWED HIM TO BE SANE AT THE TIME OF THE OFFENSE, (2) BY MISSTATING THE EVIDENCE AND IN EFFECT TESTIFYING CONCERNING PRIOR STATEMENTS OF A KEY GOVERNMENT WITNESS, AND (3) BY GIVING THE JURY INADMISSIBLE MISINFORMATION TO THE EFFECT THAT APPELLANT HAD ON MANY PREVIOUS OCCASIONS BEEN IN TROUBLE WITH THE POLICE FOR UNSPECIFIED "DIFFERENT INFRACTIONS."

The prosecuting attorney is permitted great latitude in his summation, being limited only to the evidence and resonable inferences therefrom. United States v. Holt, 108 F 2d 365 (7th Cir. 1939), cert. denied, 309 U.S. 672 (1940). In this case, the prosecutor failed to stay within these broad limits. His excesses may well have prejudiced the defendant's case before the jury, and therefore constitute reversible error.

(1) Appellant relied on the defense of insanity, bringing in issue his mental condition at the date of the crime. The prosecuting attorney asked the jury to infer sanity at that time from Appellant's demeanor during the trial ten years later. In his summation he stated:

> "There is one real, important factor in this case that has not been discussed. You weigh, ladies and gentlemen, everything that the defense psychiatrists have told you about the illness this defendant has, and its severity and its degree and stack it up against the defendant's demeanor all four weeks he has been here.
>
> "If he was as sick as these doctors have indicated, you should have seen the demonstrations here." (Tr. 2204)

Although the Trial Court called the prosecutor to the bench and asked him not to pursue that line of argument, he based his request on the possibility that "a malingerer might meet your challenge." (Tr. 2205). At the bench conference defense counsel noted the impropriety of these statements by the prosecutor (Tr. 2205). Nevertheless, the Trial Court said nothing to the jury to counteract the jury's impression that Appellant's demeanor at the trial was in issue, or that an inference of sanity at the time of the crime could properly be drawn from appearance or behavior in court almost ten years later.

The prosecutor's comment on Appellant's demeanor at the trial was improper and prejudicial for several reasons:

(a) There is no basis in the record, and certainly none in law, to infer that the absence of irrational appearance or conduct by Appellant while at the defense counsel's table is in any way probative of sanity even at the trial, much less ten years prior thereto. Moreover, the record is silent as to how Appellant comported himself and Appellant's demeanor was not in evidence. As this Court stated in the last Stewart appeal:

> "Ordinarily the mental condition of the accused at the time of trial may not be shown, and the jury may not be advised that he has been judicially found competent to stand trial. But where the accused has been found competent to

> stand trial after appropriate proceedings, and the accused takes the stand and exhibits bizarre symptoms and abnormal behavior, which if truly reflecting his mental state would make a trial legally impossible, we have a different situation. The accused has then by his demeanor put his mental condition as of the time of trial in issue." (275 F.2d at 622).

Since Appellant did not take the stand, the prosecutor's comment was unwarranted and improper.

(b) The prosecutor commented that if Appellant really were ill, it would have been demonstrated visually to the jury. In a judicial proceeding this may be accomplished only by putting the defendant on the witness stand, as was done in the third trial of this case, so that his demeanor is in evidence. Thus the prosecutor's comment implicitly reflects on and highlights the failure of Appellant to take the witness stand. The Supreme Court's decision in the third Stewart appeal, 366 U.S. 1 (1961), clearly condemns any such comment, holding that even when a defendant takes the witness stand, and thus "puts the genuineness of his demeanor into issue," questions or comments concerning his failure to take the stand at prior trials are impermissible. Surely then, Appellant having elected not to testify, and his demeanor not being in issue, such a comment is prejudicial error.

(c) If such comments were allowed in a summation, it might well require reopening of the trial to put in evidence how a defendant in fact behaved. For example, defense counsel might testify that throughout the trial a defendant was whispering gibberish in his ear. Obviously such a course cannot be permitted. Moreover, if such comments are allowed, it necessarily would be an open invitation to defendants to turn orderly trials into chaos by constant displays of their "mental derangements."

Standing alone this comment requires reversal of the conviction. Together with the prosecutor's other errors, the prejudice is clear-cut.

(2) The prosecution relied on the testimony of James Hamilton, who testified as to certain of Appellant's actions immediately before and immediately after the crime, actions on which the prosecution laid great stress (Tr. 313 et seq., 2175-77). In his rebuttal argument to the jury, the prosecuting attorney made the following statement to the jury, designed to enhance Mr. Hamilton's testimony:

> "Mr. Murray took Mr. Hamilton's fact statement that he gave, and he examined it, sat here for a few minutes, and when he got up there was nothing to ask Mr. Hamilton. Everything he testified to was included in the statement he gave on March 14th, 1953, two days after the event." (Tr. 2229-30)

This was improper for two reasons. First, Hamilton's statement, while marked for identification (Tr. 377), apparently never was introduced into evidence. Thus the prosecutor, in stating that Hamilton's entire testimony was included in

Hamilton's March 14, 1953 statement, was testifying as to facts in his knowledge.

Second, the prosecutor, based on the record, was factually incorrect. The cross-examination in question showed that Hamilton did not mention in his statement Appellant's alleged remark that "It is not my policy to give a loaded gun to anybody." (Tr. 376-8). He remembered it ten years later, but he did not mention it in a long statement given the police just two days after the crime. The prosecuting attorney considered the statement important; in his summation he said:

> "The defendant took the gun out, opened the chamber, removed all the shells, said, 'It's not my policy to hand anyone a loaded revolver.' The act of an insane person?" (Tr. 2176)

Misstatements of the evidence by the prosecution cannot be condoned, whether intentional or merely grossly careless. Testimony by the prosecutor in his summation is not permitted. These errors cannot be cured in advance by a general statement that the jury should rely on the evidence as they remember it rather than as the prosecutor restates it, and require reversal. Wallace v. United States, 281 F. 2d 656 (4th Cir. 1960) (citing Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42, 48 (1957). See also Berger v. United States, 295 U.S. 78 (1935).

(3) The prosecuting attorney during his summation, testified by innuendo that Appellant had been in constant trouble with the police. Commenting on Annie Lee Stewart's

testimony, he referred to "The many times the police came up there for different infractions." (Tr. 2189). The record reveals only one occasion when the police were "up there" in the Stewart apartment other than in connection with Stewart's arrest for the crime here involved (Tr. 726-30).

Even if the Appellant had a prior criminal record, that fact was inadmissible. It would have been irrelevant, and since he did not testify it could not have been used to impeach him. Evidence of ill-defined "different infractions" would have been even more objectionable. For the prosecutor to tell the jury of other offenses, even had the tale been true, would have been prejudicial error, particularly in view of the discretion vested in the jury regarding punishment.

IX. APPELLANT WAS DENIED A SPEEDY TRIAL: THIS PROSECUTION, ALMOST TEN YEARS AFTER THE INDICTMENT AND FOLLOWING FOUR PRIOR TRIALS, IS A DENIAL OF APPELLANT'S RIGHTS UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

This appeal is from the judgment entered after the fifth trial of the case, which commenced on October 22, 1962, nine years and seven months after commission of the crime. Appellant was indicted on April 13, 1953, on a two-count indictment charging the crimes of robbery and of first-degree murder in the perpetration of a robbery, committed on March 12, 1953.

Appellant was first brought to trial on June 16, 1953, and was convicted as indicted on June 26, 1953. He was given sentences of 5-to-15 years for robbery and capital punishment for murder. Only the murder conviction was appealed, and it was reversed by this Court on September 8, 1954, for clear error in the instructions to the jury. Stewart v. United States, 94 U.S. App. D.C. 293, 214 F.2d 879. The retrial resulted in a verdict of guilty as charged which was reversed by this Court on August 18, 1957, because of improper comments by the prosecuting attorney. Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42.

After an extensive commitment of Appellant to Saint Elizabeths Hospital to determine his mental competency, the third trial commenced on November 14, 1958. A verdict of guilty as charged was returned. The judgment was affirmed by this Court on February 16, 1960. Stewart v. United States,

107 U.S. App. D.C. 159, 275 F.2d 617. On April 24, 1961, the Supreme Court reversed and ordered a new trial because of improper cross-examination by the prosecuting attorney. Stewart v. United States, 366 U.S.1. After further commitments to establish Appellant's mental competency, Appellant's fourth trial began on February 19, 1962, and resulted in a deadlocked jury.

Additional competency examinations again were ordered, the Appellant again found competent, and after a few months delay at Appellant's request the fifth trial began on October 22, 1962, nine years and six months after the original indictment.

In Williams v. United States, 102 U.S. App. D.C. 51, 250 F.2d 19 (1957), this Court, in an opinion by Judge Bazelon, stated as follows:

> "To sustain its right to try the accused seven years after the crime, the Government must show two things, in my view: (1) that there was no more delay than is reasonably attributable to the ordinary processes of justice, and (2) that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay. My colleagues do not reach the question whether the Government must make the first showing. They agree, however, that it must make the second where the delay has been substantial. Since the delay has been substantial and we are all agreed that the Government has failed to make the second showing, we hold the conviction should be reversed and the case remanded with instructions to dismiss the indictment. For my part, I would reverse upon the additional ground that the Government has failed to make the first showing." 250 F.2d at 21-22.

Appellant submits that reversal and dismissal of the indictment are required in this case on both bases referred to in

the Williams decision. Appellant was seriously prejudiced by the delay, and the delay was more than that reasonably attributable to the ordinary processes of justice.

(a) Appellant Suffered Serious Prejudice.

(i) Appellant sought, the Government opposed, and the District Court denied Appellant a mental examination in May, 1953, shortly after the crime. In March, 1953, at the Government's request, two psychiatrists in private practice saw Appellant briefly (for one and two hours, respectively) at the jail (Tr. 2092-95, 2115, 2122-24). They concluded, on the basis of their brief interviews, that Appellant had no mental disease or defect (Tr. 2105, 2129). During the first trial, on June 21, 1953, Appellant was also examined briefly (35 or 40 minutes) at the jail by a psychiatrist obtained by him (Tr. 1443-45). Such examinations are obviously no substitute for the full examination which a court order would have provided. Such an examination was not afforded Appellant until late October, 1957, some four and a half years after the indictment.

At the most recent trial, here in issue, the prosecuting attorney fully recognized the importance of a full mental examination close to the time of the events and pointed out to the jury the frailties of psychiatric opinion, based on examinations in 1962, concerning Appellant's condition ten years earlier (Tr. 2198). He emphasized the testimony of the experts who saw Appellant shortly after the event, commented critically on the brevity of examinations by psychiatrists testifying for Appellant, and stressed the importance of the

four-month observation period at Saint Elizabeths (Tr. 2201). These comments are not improper but they do demonstrate the prejudice caused by the failure to order a full mental examination in the spring of 1953 and the subsequent delays.

(ii) Appellant's lay witnesses, whose testimony as to his behavior and general mental and emotional make-up was used to establish a history supporting the insanity defense, were subject to cross-examination such as would have been impossible had Appellant's prosecution been swift and orderly. It is obvious from the background and testimony of these witnesses that they were simple people, and not well-educated. Repeatedly they were pressed about minute discrepancies in their descriptions of events more than ten years past. Repeatedly they were cross-examined about possible inconsistencies between their current testimony and that given at any one of the four previous trials. (E.G., Tr. 459-60, 463-65, 467-68, 472-73, 478-79, 480-81, 482-83, 519-20, 524-26, 592-94, 598-99, 599-600, 604-05, 642, 650-51, 651-52, 744-45, 764-65, 767-68, 771-72, 773-74, 831, 843-44). There can be little doubt that the recollections of such witnesses, many years after the events, would become vague and imprecise, and their testimony open to greater attack.

(iii) Dr. Williams, who first saw Appellant briefly in June of 1953, was unable to find some of his original notes. This was treated by the prosecutor as a deliberate effort to conceal the truth. This could not have happened had a speedy trial been afforded Appellant. (Tr. 1444, 1459, 1464-77, 1528-41).

(iv) Five witnesses for Appellant were not available at the last trial. Their testimony at prior trials was read into the record. (Tr. 660, 678, 845, 853, 858). Live witnesses clearly are more effective than a cold record, and evidence of this is found in the fact that even the Trial Court apparently forgot their testimony in his summary of the evidence on insanity. (Compare Tr. 664-66, 680-83, 685, 845-52, 853-55, 858-62, with Tr. 2265-66).

(b) The Delays Were Unreasonable.

The first conviction was reversed because of an error by the Trial Court. The second two convictions were reversed because of errors by the prosecutors. Whether or not the Government may be charged with errors by the Trial Court, it certainly is responsible for its own mistakes. If the prosecuting attorneys did not consider the risks involved in their erroneous conduct, they took those risks nonetheless. Under Petition of Provoo, 17 F.R.D. 183 (D. Md. 1955), aff'd 350 U.S. 857 (1955), it is clear that a prosecution gamble that unreasonably delays the trial entitles the accused to dismissal of the indictment against him.

* * *

Quite apart from the specific aspects of prejudice and delay, it is unseemly and offensive that any accused shall have unanswered, after five trials and ten years, the question whether his fate shall be life or death. There must be an end to this process. The trial below was clearly unfair for all the reasons enumerated elsewhere in this brief. Appellant

was sentenced to 5-to-15 years' imprisonment for robbery, which sentence stands unappealed. The public interest is fully protected by that sentence and by the commitment procedures available for removing the dangerous mentally ill from society. Appellant's conviction should be reversed for the reasons herein and heretofore stated, and the indictment should be dismissed.

CONCLUSION

For the foregoing reasons Appellant urges that his conviction must be reversed and the indictment dismissed or the case remanded for a new trial.

Respectfully submitted,

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APPENDIX A

TRIAL COURT'S CHARGE ON THE ISSUE OF INSANITY

So much for the evidence in support of the charge of murder.

Counsel for the defendant, however, contend that the defendant should not be found guilty because, so they say, he was not mentally responsible for his acts. It is what is popularly known as the defense of insanity.

In case the defendant's sanity is in issue, as it is in this case, the Government has a twofold burden of proof. First, as I have indicated, the Government must prove beyond a reasonable doubt that the defendant committed the crime charged in the indictment; second, the Government must prove beyond a reasonable doubt that the defendant was mentally responsible for the crime with which he is charged, within the rules that I shall explain in a few moments.

If it is not established beyond a reasonable doubt that the defendant committed the crime with which he is charged, then, of course, your verdict would be not guilty. If, however, it is established that the defendant committed the crime, but it is not established beyond a

reasonable doubt that he was mentally responsible for the crime, then the jury must find him not guilty on the ground of insanity, expressly specifying in so many words that he is being found not guilty on the ground of insanity. In that event, the law would make it the mandatory duty on the part of the Court to commit the defendant to a mental hospital.

The defendant would not be entitled to be released from the mental hospital, under such a commitment, unless and until the Superintendent of the hospital certifies to the Court that the defendant has recovered his sanity, that in the opinion of the Superintendent the defendant will not in the reasonable future be dangerous to himself or others, and that in the opinion of the Superintendent the defendant is entitled to his unconditional release from the hospital.

Upon receipt of such a certificate the Court, either with or without a hearing, may unconditionally release such a defendant from the mental hospital if it approves the certificate and finds that the defendant has recovered his sanity, will not in the reasonable future be dangerous to himself or others, and is entitled to his unconditional release.

Now let me discuss the issue of mental responsibility. It is claimed in behalf of the defendant that he should not be held responsible for this crime on the alleged ground that he was at that time suffering from a mental

disease or mental defect or both and that this crime was the product of the mental disease or mental defect or both.

In certain instances, the law indeed does not hold an insane person responsible for his criminal acts. In order to be responsible for his acts a person must have the mental capacity to commit the act with which he is charged. It is not, however, in every case in which the accused is suffering from some mental abnormality or some mental deficiency or defect or from some mental disorder that he is to be deemed free from liability for his crimes and not responsible for his acts. There are many abnormal persons or persons afflicted with mental deficiencies or suffering from personality disorders or mental disorders whom the law, in certain instances, holds responsible for certain crimes that such a person may commit. On the other hand, there are certain types of persons afflicted with a mental disease or mental defect who, under certain circumstances, are not held responsible for particular crimes.

The law prescribes the following test of mental responsibility for a criminal offense: First, was the defendant suffering from some mental disease or from some mental defect? And, second -- and this is very important -- if he were suffering from a mental disease or mental defect at the time of the commission of the crime, was the crime a

product of that mental disease or mental defect?

If both questions are answered in the affirmative, the defendant is not responsible for his criminal act. If either question is answered in the negative, then the defendant is responsible for his criminal act.

Now let me summarize this again because this is the crux of this particular issue. The test of mental responsibility is as follows: First, was the defendant suffering from some mental disease or from some mental defect? And, second, if he was suffering from a mental disease or mental defect, was the crime a product of that mental disease or mental defect?

What, then, is a mental disease or mental defect? The law defines that, too, and the law defines mental diseases or mental defects as follows: A mental disease or defect is any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

In other words, not every mental abnormality is a mental disease or mental defect in the eyes of the law, but only a type of mental abnormality that meets this definition.

Let me read that definition again because it is important. A mental disease or defect includes any abnormal condition of the mind which substantially affects mental or

emotional processes and substantially impairs behavior controls.

In other words, a mental condition or abnormality, to constitute a mental disease or mental defect in the eyes of the law, must be such an abnormal condition of the mind which, first, substantially affects mental or emotional processes, and, second, substantially impairs behavior controls. Unless such abnormal condition of the mind substantially affects mental or emotional processes and, in addition, substantially impairs behavior controls, it is not regarded by the criminal law as a mental disease or defect.

In addition to being afflicted with a mental disease or defect, within the definition that I have just given you, in order that the defendant may not be deemed mentally responsible for his criminal act the crime itself must be the product of that mental disease or of that mental defect.

As I have already indicated to you, the burden of proof in this issue, as on all other issues in the case, is on the Government. In other words, in order that the defendant may be found guilty as charged the Government must prove beyond a reasonable doubt that the defendant did not have any mental disease or mental defect at the time of the crime, within the meaning of those words that I have given

you, or that even if he had been suffering from a mental disease or mental defect, that the crime was not the product of such mental disease or mental defect.

Consequently, if you should be convinced beyond a reasonable doubt either that the defendant was not suffering from a mental disease or mental defect, or even if he had been so suffering at the time he committed the crime, that the crime itself was not the product or result of the mental disease or mental defect, you may find the defendant guilty, assuming, of course, that the fact of the crime is properly established.

Of course, every person is presumed to be sane until the contrary appears. This presumption is founded on human experience. However, as I have indicated to you, this presumption does not mean that the burden of proof is on the defendant to prove insanity. In cases in which insanity is properly in issue, as it is in this case, the burden is on the Government on the issue of insanity or mental capacity, just as it is on every other issue in the case, and that burden must be sustained beyond a reasonable doubt.

I have already explained to you what a reasonable doubt means. Proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty and not to a mathematical or absolute certainty.

It does not mean that the evidence must be all one way. It means that you must carefully weigh the evidence on both sides, including the presumption of sanity, and make an impartial comparison and consideration of all of it and then ask yourself whether you can truthfully and candidly say to yourself that, as a result of your review and weighing of the evidence on both sides, you have an abiding conviction of the defendant's mental responsibility for the crime with which he is charged, such a conviction as you would be willing to act upon in the more wieghty and important matters relating to your own affairs. If you have such a conviction, then you may find the defendant guilty as charged, provided, of course, it is proven beyond a reasonable doubt that he committed the act with which he is charged. If you do not reach such a conclusion, then your verdict should be not guilty on the ground of insanity, again if it has been proven beyond a reasonable doubt that the defendant has committed the act with which he is charged.

In considering the issue of insanity the law permits you to consider the question whether the defendant, at the time he committed the offense, knew the difference between right and wrong and, even if he knew the difference, whether he acted under the compulsion of an irresistible impulse as a result of mental derangement or had been deprived of or lost the power of his will as a result of mental

derangement. But you are not limited to these matters and you may consider all of the evidence in order to reach a conclusion as to whether he was or was not suffering from a mental disease or defect at the time in question and, if he was, whether the crime was the product of that mental disease or defect.

The question whether the defendant at the time of the commission of the crime was suffering from a mental disease or mental defect and the question whether, if that be the case, the crime was the product of such mental disease or mental defect, is for the jury to determine. The decision of the jury cannot be controlled by expert opinions. Otherwise, we would have a trial by experts instead of a trial by jury. The jury must determine for itself, from all of the testimony, lay testimony and expert testimony, and you must consider both, whether a mental disease or defect existed and, if so, whether the crime was the product of that condition.

Now, then, let me pass on to a consideration of the evidence introduced by each side on the issue of mental responsibility, and I want to remind you again what I said at the opening of my remarks, that my discussion of the evidence is not binding on you, it is intended only to help you, and if your recollection or understanding or view of the evidence differs in any respect from mine, then it is your

recollection, your understanding and your view of the evidence that must prevail. The decision on the facts is entirely within your domain. That is your duty, your function and your responsibility.

In connection with a summary of the evidence, I shall only call attention to certain items of evidence. I may omit some that perhaps appear important to you. On the other hand, I may mention some that to you may seem unimportant. It is your view of the evidence that prevails.

Both sides called lay witnesses and expert witnesses. I shall take up the defendant's evidence first because it was introduced first.

In behalf of the defendant evidence was introduced that his grandfather died in a mental institution, although the Government later showed that the mental disease from which the grandfather suffered was the consequence of syphilis.

In behalf of the defendant it was also shown that the defendant had three aunts who were of unsound mind. There was no adverse evidence, however, as to the sanity of the defendant's father and mother.

Evidence was introduced that the defendant was brought up by his grandmother on a farm, in a small town or near a small town in South Carolina, and that he had a somewhat unhappy childhood and was not successful in school, not

going beyond the fourth grade.

Evidence was introduced that he ran away from home and came to Washington as a young man.

Evidence was also introduced in behalf of the defendant that on several isolated occasions he committed individual acts of violence or was involved in an outburst of temper in his own family circle.

Several expert witnesses were called in behalf of the defendant. Dr. Endacott, a psychologist, expressed the opinion that the defendant was a mental defective.

Dr. Sprehn, a psychiatrist, expressed the opinion that the defendant was not a mental defective, but that he was mentally ill, suffering from an ailment known as schizophrenia of the mixed type.

Dr. Legault expressed the opinion that the defendant was not a mental defective, but very close to it, and was on the borderline of normal intelligence and that he was a constitutional psychopath of the emotionally unstable type.

Dr. Williams expressed the opinion that the defendant was a low-grade moron and a manic depressive.

Dr. Kastner expressed the opinion that the defendant was suffering from an ailment known as schizophrenic reaction, paranoid type.

Dr. Salzman testified that, in his opinion, the defendant was a mental defective with psychosis. When questioned on cross-examination, however, Dr. Salzman stated that the defendant learned to read and write while in jail and that the defendant received mail in jail and that the defendant wrote letters to his wife and sister-in-law.

Taking up now the evidence introduced by the Government, the Government introduced evidence to the effect that the defendant came to Washington as a young man; that he later married and had four children; that he earned a living regularly, first as a busboy and a waiter and then as a laborer in the construction industry, as a plasterer, bricklayer and also as a window washer.

Evidence was introduced to the effect that he was considered a good worker and that except on a few occasions, when he was guilty of an outburst of temper or act of violence, he was a good husband and father.

Evidence was introduced that he served a term of enlistment in the Army and that he reenlisted on the day after he was discharged and was accepted for reenlistment; that during his Army service he was stationed in the Pacific Theater and drove a truck; that he was discharged from the Army after having been court-martialed as a result of an assault charge.

(Tr. 2268)

An acquaintance, whose name is William Fountaine, testified that for some time he lived across the street from the defendant; that he and the defendant used to meet three or four mornings a week at a local delicatessen store, where the defendant drank coffee, that they conversed there and elsewhere; that he, Fountaine, played poker with the defendant on several occasions and that the defendant was a good poker player. Fountaine further testified that the defendant did not act or speak in any way that was unusual or bizarre.

Evidence was introduced in behalf of the Government that before the murder the defendant obtained his brother-in-law's revolver or pistol; that after the murder involved in this case the defendant left the Honikman grocery store, changed his clothes, and then came back to resume a card game in which he had been engaged earlier in the day. You have a right to consider whether he did that to create an alibi or for some other purpose.

Evidence was introduced that the card game in which he was engaged was bid whist and that the defendant was a good player.

Evidence was further intriduced that on the following day the defendant returned the gun, which he had previously borrowed, to its owner; and that when the police came looking for him two days after the murder he first tried

to hide and then surreptitiously left his home and tried to evade the police officers.

John Rosell, an employee of the jail, testified that in accordance with his routine duties he interviewed the defendant at the jail on March 17th, 1953, the day after the defendant had been brought to the institution; that the defendant was cooperative, answered questions intelligently and did not act in any unusual manner.

Charles Rogers, who at the time the defendant was brought to the jail was the cell block officer of the cell block in which the defendant was incarcerated, testified that he saw the defendant daily or almost daily during the first few months of his incarceration and that he observed no unusual conduct on the defendant's side and that he had frequent conversations with the defendant.

Captain Depro, an officer at the jail, testified that for the first two years of the defendant's stay at the jail there was nothing unusual about his behavior, that he did a lot of reading in his cell, and that he wrote letters.

There were introduced in evidence requests to jail officers, filled out on jail forms. These requests were written by the defendant in his own handwriting and signed by him and they were routine requests, or might be called routine requests, sometimes for interviews, sometimes for a

change in the mailing list, sometimes for one thing and another. In one of these requests the defendant asked that he be furnished with the District of Columbia Code, Titles 18 to 44. Now, I might state to you, ladies and gentlemen, that that is the volume of the District of Columbia Code that contains the criminal law. In another request, at another time, he requested that he be furnished with Title 28 of the United States Code, and that is the part of the Code that regulates procedure of the courts in criminal cases and in civil cases, as well.

The Government called several expert witnesses. Dr. Cavanagh testified that he examined the defendant at the request of the Government in 1961 and again in 1962 and that he also arranged to have his examination supplemented by a series of tests conducted at the District of Columbia General Hospital. Dr. Cavanagh reached the conclusion and expressed the opinion that the defendant was of sound mind, that he was not afflicted with any mental disease or mental defect, and that he was malingering.

Dr. Mauris Platkin, a psychiatrist on the staff of St. Elizabeths Hospital, testified that the defendant had been committed to St. Elizabeths Hospital for an examination at the request of defendant's counsel and that the defendant was at the hospital under constant observation for a considerable period. During that time, according to Dr. Platkin, the

defendant was examined by a number of doctors, as well as by psychologists, was under continuous observation by ward attendants and was subjected to various tests. He attended a Bible study class while in the hospital and participated in other activities. Dr. Platkin was of the opinion that the defendant was without mental disease and without mental defect.

Dr. Elmer Klein and Dr. Kleinerman testified that they examined the defendant in March 1953, within two weeks after the murder, at the request of the United States Attorney. Each of them reached the conclusion and expressed the opinion that the defendant was not suffering from any mental disease and was not mentally defective, that he knew the difference between right and wrong and was able to adhere to the right. Dr. Cavanagh and Dr. Platkin had expressed the same opinion.

Evidence was introduced that the defendant improved himself during his stay in the jail in reading and writing and that he read the Bible and other books in his cell, including poetry, and that he wrote letters.

Now, as I said before, the decision on the facts is your function, your duty and your responsibility. Anything I have said about the evidence and the facts is intended only to help you and is not binding on you.

APPENDIX B

ANALYSIS OF THE TRIAL COURT'S SUMMARY OF THE EVIDENCE ON THE ISSUE OF INSANITY

In order most clearly to present what we believe to be the unfair and prejudicial manner in which the Trial Court summarized the issue on insanity, we will quote seriatim from the Trial Court's summary of Appellant's evidence and then, in each instance, summarize the evidence on this point as it actually appears in the transcript of the trial. This summary will indicate the correct or additional material which we believe the Trial Court should have included to make the summary fair and meaningful. Thereafter we shall similarly treat certain parts of the Trial Court's summary of the Government's evidence on this issue.

Overall, while there were a number of actual misstatements, we regard the terse summary of Appellant's expert testimony, where no more than a series of apparently inconsistent diagnostic labels was given to the jury, as the most misleading and serious error. In fact the findings of the six experts were basically similar and the Trial Court's summary, by totally ignoring the consistencies in the findings, almost constituted ridicule. Moreover, the overwhelming evidence of mental retardation, including the testimony of Government experts, was ignored by the Court. This could have influenced the jury on the punishment as well as the insanity issue.

A. Trial Court's Summary of Appellant's Evidence (Tr. 2265-67, App. A, p. 9a-11a).

> "In behalf of the defendant evidence was introduced that his grandfather died in a mental

institution, although the Government later showed that the mental disease from which the grandfather suffered was the consequence of syphilis.

"In behalf of the defendant it was also shown that the defendant had three aunts who were of unsound mind. There was no adverse evidence, however, as to the sanity of the defendant's father and mother." (Tr. 2265, App. A, p. 9a).

/Appellant's brother was a psychotic who was totally unable to care for himself, and Appellant was raised in the same household as his brother. There was testimony that Appellant's children often had fits and convulsions, and testimony that Appellant's son recently was diagnosed as having a psychotic reaction (Tr. 664-65, 800-803, 733, 1599-1600)./7

"Evidence was introduced that the defendant was brought up by his grandmother on a farm, in a small town or near a small town in South Carolina, and that he had a somewhat unhappy childhood and was not successful in school, not going beyond the fourth grade.

"Evidence was introduced that he ran away from home and came to Washington as a young man." (Tr. 2265-66, App. A, p. 9a, 10a)

/Appellant's parents abandoned him when Appellant was very young, leaving him with his grandmother. His grandmother repeatedly tied Appellant up, and while he had no clothes on whipped him with a plow rope which is approximately the thickness of one's large finger, until Appellant bled. Appellant would show no reaction to these whippings. Appellant behaved peculiarly as a child, both at school and at home, taking his clothes off and cutting up his clothes, leaving school, and often throwing his food on the floor for no apparent reason. In school he was known as a "dummy" (Tr. 680-83, 688-89, 787-95, 798-99, 828-30)./7

> "Evidence was also introduced in behalf of the defendant that on several isolated occasions he committed individual acts of violence or was involved in an outburst of temper in his own family circle." (Tr. 2266, App. A, p. 10a)

This is a complete misstatement of the record. The correct statement should be: Evidence was also introduced in behalf of the defendant that on numerous occasions, when with family or friends, he committed acts of violence or was involved in extreme outbursts of temper or other erratic actions, and shortly after many of such occasions he would deny any recollection of his actions. Defendant's wife, and a number of other witnesses, including members of defendant's wife's family, testified to many occasions of unprovoked violent action by defendant, including fights, sexual molestation of women while their husbands were present, shooting, the breaking of windows, doors, a ceiling, kitchen equipment, and dishes, destroying clothing, and threatening to harm his children severely. (Tr. 690 et seq., 412 et seq., 497 et seq., 528 et seq., 607 et seq., 690 et seq., 805-15). Co-workers with defendant testified that he also behaved in a violent, destructive, or peculiar manner on the job, and with friends and family (Tr. 846-52, 853-58). Yancy Peterson, who served in the Army with defendant, testified that defendant deliberately drove a truck off a cliff for no apparent reason and behaved strangely in other ways while in the Army (Tr. 858 et seq.). The Army records show that defendant was involved in an assault charge, where he utilized a knife in a fight over a gambling game, was court martialed for this action, but otherwise served satisfactorily (Tr. 1552-56).7

> "Several expert witnesses were called in behalf of the defendant. Dr. Endacott, a psychologist, expressed the opinion that the defendant was a mental defective." (Tr. 2266, App. A, p. 10a)

/Dr. Endacott further testified that based upon a Rorschach test, defendant might have an organic brain disease, and that his intellectual and his emotional controls were operating very poorly, that he was very impulsive, and capable of very aggressive behavior on a moment's notice. He stated that at the time of the crime defendant was probably in some sort of disassociation which meant that he was not aware of what he was doing, and stated that at the time of the crime defendant could not distinguish right from wrong and could not foresee the consequences of his act. He stated that Appellant had an abnormal condition which substantially affected his emotional and mental processes and impaired his behavior controls. He also stated that in his opinion defendant was not malingering when he was tested (Tr. 902, 904, 942, 943-44, 953, 988-89)./7

> "Dr. Sprehn, a psychiatrist, expressed the opinion that the defendant was not a mental defective, but that he was mentally ill, suffering from an ailment known as schizophrenia of the mixed type." (Tr. 2266, App. A, p. 10a)

/Dr. Sprehn stated that the schizophrenia also had paranoid features, but did not conform to any classical description as to type. He described disassociation as one aspect of this schizophrenia and automatic responses with intense rage as another aspect. He testified that in his opinion the schizophrenia, along with the disassociation aspect, existed at the time of the crime, and that there was a causal relation between the disease and the crime. He found that at the time of the

crime defendant's emotional and mental processes and behavior controls were substantially impaired as a result, and that Appellant could not determine right from wrong, and that he could not refrain from committing the crime because of an irresistible impulse of an undefined nature. He concluded that Appellant was not malingering when he examined him, and that malingering would require greater training and intelligence than Appellant possessed. (Tr. 1138-39, 1145, 1146-48, 1152, 1190, 1199-1200, 1205-06, 1220, 1242).7

> "Dr. Legault expressed the opinion that the defendant was not a mental defective, but very close to it, and was on the borderline of normal intelligence and that he was a constitutional psychopath of the emotionally unstable type." (Tr. 2266, App. A, p. 10a)

/Dr. Legault testified that defendant was a borderline mental defective, with an IQ of 70, which would make him a moron at the upper level, but he also testified that defendant might be just over the borderline into normalcy. He stated that Appellant definitely was mentally ill, and probably was a constitutional psychopath of the emotionally unstable and schizoid type. While he did not find defendant psychotic at the time of the examination, he said that such a person very often will behave in a psychotic fashion on one occasion and on another be quite well in contact. He stated the defendant tended to react without cause in an explosive, erratic, and violent manner, and that his mental disorder impaired his behavior controls and mental and emotional processes at the time of the crime. He expressed the opinion that Appellant was mentally ill and in a state of disassociation at the time

of the murder. He stated that the illness involved erratic, impulsive, senseless behavior, and that in defendant's history instances of depression were present. He stated that he did not believe Appellant was malingering when he examined him, and expressed the opinion that it was virtually impossible to malinger on the Rorschach test which had been given by Dr. Endacott, and that the results of that test confirmed Dr. Legault's diagnosis. He also stated that a person such as defendant might behave well in a controlled environment such as jail because the discipline had theraputic value. (Tr. 1267, 1274, 1276, 1282, 1284-85, 1299-1300, 1314-15, 1317, 1322-25, 1354-56, 1394-95, 1402-04).7*

> "Dr. Williams expressed the opinion that the defendant was a low-grade moron and a manic depressive." (Tr. 2266, App. A, p. 10a)

/Dr. Williams testified that after his initial interview he had some question about his diagnosis, and that in 1958 he also had found evidence of a schizo-affective psychosis. At that time he thought defendant was a manic depressive with schizophrenic traits but he now believed defendant to be simply a manic depressive because of the additional information he had received. Among the characteristics of this illness were automatically committed acts of violence which seemingly were unprovoked. He believed defendant was suffering

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* It should be noted that the Trial Court's comments and questions when Dr. Legault testified may have resulted in the jury giving less credence to his enlightening testimony than it deserved (Tr. 1277-81, 1282-83, 1292-94, 1304-05, 1312, 1316, 1318, 1321, 1328-29, 1360, 1362-63, 1370, 1371, 1376-77, 1384-86, 1400, 1406, 1422-23).

from this illness at the time of the crime. He did not think defendant knew the difference between right and wrong at the time of the crime, and stated that if defendant did know the difference he could not adhere to it. He did not think that defendant was malingering when he examined him. He also stated that in a controlled environment a person such as defendant might behave very well. (Tr. 1435-36, 1439-40, 1460-62, 1487-88, 1496, 1506-07, 1514-15).7

> "Dr. Kastner expressed the opinion that the defendant was suffering from an ailment known as schizophrenic reaction, paranoid type." (Tr. 2266, App. A, p. 10a)

/Dr. Kastner said that he was certain that defendant was psychotic but he was not sure of the precise etiology. He thought that defendant probably was schizophrenic. He considered that defendant was mentally ill at the time of the crime with an emotional disorder probably of a schizophrenic nature. This would involve disturbed thinking, erratic behavior, impulsive action, poor judgment, and loss of control. He considered that defendant, at the time of the crime, was not focusing on the crime but on other preoccupying thoughts. He found defendant confused and disoriented during the examination. He did not consider that defendant had the mental facility and capacity to malinger. He noted that on initial examination it sometimes was not clear whether the diagnosis should be manic depressive or schizophrenia, that "certain elements of manic depressive psychosis tend to mimic schizophrenia," and sometimes the diagnoses of the two were mixed,

with the manic depressive diagnosis being made only after evidence of repetitive cycles (Tr. 1607-17, 1621-25, 1627, 1667)./7

> "Dr. Salzman testified that, in his opinion, the defendant was a mental defective with psychosis. When questioned on cross-examination, however, Dr. Salzman stated that the defendant learned to read and write while in jail and that the defendant received mail in jail and that the defendant wrote letters to his wife and sister-in-law." (Tr. 2267, App. A, p. 11a)

/Dr. Salzman stated that to be mentally defective did not mean that the person had to be "totally stone dumb." He found defendant confused, disoriented, and deteriorated. He stated that a characteristic of mental defectives is "under extreme situations or even under minimal pressure situations, to behave in a completely meaningless, in completely unresponsive behavior. . ." He did not believe that defendant was malingering when he examined him nor did he have the intellectual capacity to malinger. He expressed the opinion that at the time of the crime defendant was mentally defective with some psychosis, possibly schizophrenia. He also pointed out that in psychiatry labels do not describe a specific situation, they describe a range. While he thought that most crimes were not the result of mental illness, but to gain something for nothing, he considered defendant's behavior during the crime "to be without any clear, calculated plan, but, rather, the behavior of someone who, in some distorted and sick way, found himself out of control and, in a sense, almost being forced into a crime which wasn't even necessary." He thought defendant propelled by some uncontrollable or irresistible force. (Tr. 1684-98, 1700-02, 1710-11, 1716, 1734, 1751-53, 1756, 1780-81)./7

B. Summary of Government's Evidence (Tr. 2267-71).

Rather than repeat the four and one-half page summary of the Government's evidence, we will quote only those portions which are improper due to misstatement or omission:

* * *

> "Evidence was introduced to the effect that he was considered a good worker and that except on a few occasions, when he was guilty of an outburst of temper or act of violence, he was a good husband and father." (Tr. 2267, App. A, p. 11a)

/The Government did not introduce such evidence. Witnesses for defendant, who testified as to his numerous acts of violence and gave opinions that he was of unsound mind, also testified that when he was not violent he was a good worker, husband and father (Tr. 853; 742)./

* * *

> "Evidence was introduced that he served a term of enlistment in the Army and that he reenlisted on the day after he was discharged and was accepted for reenlistment; that during his Army service he was stationed in the Pacific Theater and drove a truck; that he was discharged from the Army after having been court martialed as a result of an assault charge." (Tr. 2267, App. A, p. 11a)

/In fact the evidence relating to defendant's Army career was introduced by defendant. It consisted of defendant's Exhibit 5, defendant's Army record, and the testimony of one witness, Yancy Peterson, who served in the Army with defendant. (Tr. 858 et seq.) The Trial Court, in its summary, omitted the following: The Army found that defendant was a mental defective and a complete illiterate, although without psychosis or neurosis. His combined intelligence quotient on the

Wechsler-Bellevue intelligence test was 65, that his scoring on the Terman vocabulary test was the equivalent of an intelligence quotient of approximately 58. The Army psychologist concluded concerning defendant, that "with his intelligence and his learning aptitude, it would be practically useless to send him to the school for illiterates" (Tr. 1552-56). Yancy Peterson testified that he knew defendant in the Army and he considered him to be of unsound mind. He stated defendant deliberately drove a truck off a cliff for no apparent reason, "and things that he did he seemed like he didn't have any knowledge that he was doing wrong." (Tr. 859-60).7

* * *

> "Captain Depro, an officer at the jail, testified that for the first two years of the defendant's stay at the jail there was nothing unusual about his behavior, that he did a lot of reading in his cell, and that he wrote letters." (Tr. 2269, App. A, p. 13a)

Captain Depro testified that on one occasion, in 1955, defendant tore up his bedding, beat his hands and fists on the cell walls and was sent to the jail hospital for a week (Tr. 2071-72). Other evidence showed additional rage outbursts. (Tr. 2062-63, 2053).7

* * *

> "The Government called several expert witnesses. Dr. Cavanagh testified that he examined the defendant at the request of the Government in 1961 and again in 1962 and that he also arranged to have his examination supplemented by a series of tests conducted at the District of Columbia General Hospital. Dr. Cavanagh reached the conclusion and expressed the opinion that the defendant was of sound mind, that he was not afflicted with any mental disease or mental defect, and that he was malingering." (Tr. 2270, App. A, p. 14a)

Dr. Cavanagh did not consider the murder impulsive but nevertheless described defendant as a "primitive" person as distinguished

from a "normal" or "average" person. He described a "primitive" person as one who "acts out his conflicts, doesn't stop to think . . . These things came out spontaneously, acted out, there is no thinking.. . ." He stated that while an average person does not have the tendency to "act out," nevertheless "acting out is not necessarily an evidence of mental illness." (Tr. 1948-55).7

* * *

> "Dr. Mauris Platkin, a psychiatrist on the staff of St. Elizabeths Hospital, testified that the defendant had been committed to St. Elizabeths Hospital for an examination at the request of defendant's counsel and that the defendant was at the hospital under constant observation for a considerable period. During that time, according to Dr. Platkin, the defendant was examined by a number of doctors, as well as by psychologists, was under continuous observation by ward attendants and was subject to various tests. He attended a Bible study class while in the hospital and participated in other activities. Dr. Platkin was of the opinion that the defendant was without mental disease and without mental defect." (Tr. 2270-71, App. A, p. 14A-15a)

/Dr. Platkin testified that the doctor who reported the admission interview at St. Elizabeth's found defendant "disoriented in all spheres" and uncooperative. He also testified on cross-examination that a Rorschach test given at St. Elizabeths showed "uncontrolled, emotional outbursts." Dr. Platkin doubted there was any malingering on that test. Dr. Platkin also testified on cross-examination that defendant might have a "moderate degree of mental deficiency," that he had reports of violent behavior by defendant while in jail, and that some of his alleged behavior showed possibly an "ungovernable temper," "uncontrollable with respect to the incident." (Tr. 1991, 2044, 2050, 2053, 2061-64).7

"Dr. Elmer Klein and Dr. Kleinerman testified that they examined the defendant in March 1953, within two weeks after the murder, at the request of the United States Attorney. Each of them reached the conclusion and expressed the opinion that the defendant was not suffering from any mental disease and was not mentally defective, that he knew the difference between right and wrong and was able to adhere to the right. Dr. Cavanagh and Dr. Platkin had expressed the same opinion." (Tr. 2271, App. A, p. 15a)

/Dr. Klein described defendant as a simple individual of limited intellectual resources who engaged in childish types of impulsive behavior (Tr. 2102). Dr. Kleinerman admitted on cross-examination that if defendant committed the many alleged acts of violence and really did not recall them, something was wrong with his mind (Tr. 2140)./

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V:

> "...[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

D. C. Code Sec. 22-2401 (1961 ed.), 31 Stat. 1321, as amended, 54 Stat. 347:

> "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate. . . robbery, . . . is guilty of murder in the first degree."

D. C. Code Sec. 22-2403 (1961 ed.), 31 Stat. 1321, as amended, 54 Stat. 347:

> "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

> "Dr. Elmer Klein and Dr. Kleinerman testified that they examined the defendant in March 1953, within two weeks after the murder, at the request of the United States Attorney. Each of them reached the conclusion and expressed the opinion that the defendant was not suffering from any mental disease and was not mentally defective, that he knew the difference between right and wrong and was able to adhere to the right. Dr. Cavanagh and Dr. Platkin had expressed the same opinion." (Tr. 2271, App. A, p. 15a)

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> "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

D. C. Code Sec. 22-2404, 31 Stat. 1321, as amended, P. L. 87-423, 87th Cong., 2d. Sess. (Mar. 22, 1962), 76 Stat. 46, 1962 U.S. Code Cong. & Ad. News 466:

> "The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment. ..."

Federal Rules of Criminal Procedure, 18 U.S.C.A. (1961 ed.), Rule 48(b):

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17486

WILLIE LEE STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
ALFRED HANTMAN,
GERALD A. MESSERMAN,
Assistant United States Attorneys.

No. 17486

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Whether the right to a speedy trial requires dismissal of a first-degree-murder indictment where delay between indictment and trial is caused by the normal operation of the appellate system, where the only delay between reversal and new trial was requested by the accused, and where the accused profited by the necessary delay?

2. Whether the trial court was obliged to give a second-degree-murder instruction in a felony-murder case where the evidence established that the accused left home with a gun after being unable to obtain money from his wife, that he went to a grocery store and remained there until the store was about to close, and that he then shot the proprietor and removed $416.00 from his cash register, where there was no competent evidence relevant to the issue of second degree murder, and where no instruction on that offense was requested?

3. Whether the trial court abused its discretionary power to control the order of proof by compelling defense counsel to present expert testimony on the issue of insanity before the government went forward with its proof on that issue, where defense counsel announced his intention of presenting such testimony, but asserted that he would do so only after the government had gone forward, and where all experts whom the defense was compelled to call stated that the defendant's act was a product of mental illness?

4. Whether an instruction on the issue of insanity requires reversal where:

A. The jury was informed four times that the burden of proving sanity beyond a reasonable doubt was upon the government, it was never suggested that any affirmative findings were necessary to a verdict of not guilty by reason of insanity, and the court accurately stated the *test* for mental responsibility and the *procedural rules* applicable to that test?

B. The jury was told that "disease or defect" means "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs

684043—63——1

behavior controls," that it was not bound by the opinions of experts in reaching its decision, and it was adequately informed of the required relationship between the abnormal mental condition, if any, and the act committed?

5. Whether the court's accurate and impartial summary of the evidence on the issue of insanity, preceded and followed by five explicit admonitions that the jury's recollection of the facts was controlling, provides a basis for reversal?

6. Whether the trial court properly instructed the jury on the question of punishment where it stated that the jury might recommend life imprisonment, and that it should report its disagreement to the court if unable to agree unanimously regarding punishment, where the court made no effort to define or limit the jury's discretion regarding punishment, and where the jury was not informed of the possible consequence of its failure to agree on the question of punishment?

7. Whether appellant may validly assert that he was denied a fair trial because the prosecutor exercised his peremptory challenges against more Negroes than whites, where the prosecutor announced his satisfaction with the jury panel when it contained members of the Negro race, and where the record does not demonstrate the racial composition of the panel finally selected?

8. Whether error may be predicated upon the trial court's failure to inquire regarding the attitudes of prospective jurors toward capital punishment, where defense counsel requested no such inquiry and no objection was made to its absence?

9. Whether reversal is warranted by 1) the prosecutor's comment upon evidence in the record which reflected upon the credibility of a key defense witness; 2) his remark regarding a written statement which was identified but not introduced into evidence, where the remark was substantially accurate, the statement insignificant, and no objection was raised when the remark was made; or 3) the prosecutor's reference to the defendant's physical appearance and demeanor in court, where four defense experts had noticed and relied upon his *current* demeanor and appearance in making their diagnoses?

INDEX

TABLE OF CASES

*Cases chiefly relied upon.

OTHER REFERENCES

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UNITED STATES OF AMERICA, APPELLEE

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Prior proceedings

In an indictment filed on April 13, 1953, appellant was charged with robbery and first degree murder. (J.A. 1). He was tried by a jury, found guilty as charged, and sentenced to death. On July 15, 1954, this Court reversed the judgment because of error in the insanity instruction. *Stewart* v. *United States*, 94 U.S. App. D.C. 293, 214 F. 2d 879 (1954). Commenting upon the evidence, this Court stated: "There is not the slightest doubt from the evidence, however, that he committed the offense." *Id.* at 294.

In 1955, appellant was tried by a second jury, convicted, and sentenced to death. The judgment was reversed by a 5–4 decision on April 18, 1957, because the prosecutor suggested in closing argument that appellant's wife and sister-in-law had offered perjured and fabricated testimony.[1] *Stewart*

[1] Error was not claimed on that ground by appellant, nor was objection made to the remark at trial. 94 U.S. App. D.C. at 57 (dissenting opinion).

684043—63——2

v. *United States*, 101 U.S. App. D.C. 51, 247 F. 2d 42 (1957). This Court recognized that the evidence in both trials "* * * made it unmistakably that, if the appellant was legally sane, he was guilty of the homicide charged against him." *Id.* at 52.

Appellant was tried a third time in November, 1958. He was convicted by a jury and sentenced to death. Upon appeal to this Court, the judgment was affirmed in a 5–4 decision. *Stewart* v. *United States*, 107 U.S. App. D.C. 159, 275 F. 2d 617 (1960).[2] That decision was reversed by a 5–4 decision of the Supreme Court on April 24, 1961, because appellant, testifying for the first time, was asked whether he had taken the stand in either of his previous trials. *Stewart* v. *United States*, 366 U.S. 1 (1961).

Appellant's fourth trial commenced on February 19, 1962, and resulted in a deadlocked jury (J.A. 4).

A fifth trial commenced on October 22, 1962. On November 15, 1962, the jury returned a verdict of "guilty as charged." (J.A. 12). Judgment was entered on November 20, 1962, and Stewart was sentenced to death. (J.A. 14).[3]

B. *Voir dire* examination and selection of jurors

The *voir dire* examination of prospective jurors was conducted by the trial court. After propounding several questions, the court asked counsel whether they had any additional questions they cared to have asked. (Tr. 23). Defense counsel requested that the court ask whether the prospective jurors had ever expressed any views on capital punishment. The court replied that the defense was entitled to that question, (Tr. 35); it was propounded to the panel and brought no response. (Tr. 49). Defense counsel also suggested the following question: "Have you ever expressed disappointment or

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[2] Regarding proof of the offense, the Court stated: "The evidence of the robbery and killing in the record now before us is the same in all significant respects as in two prior trials and shows beyond any doubt, as this Court has always acknowledged, that Stewart committed the act charged." 107 U.S. App. D.C. at 160.

[3] Appellant does not contend that the government is responsible for any unnecessary delay between reversals and new trials. The facts in his Motion For Dismissal For Lack of Speedy Trial demonstrate that 62 months were consumed by appeals, and that the accused was responsible for almost all other delay. (J.A. 2–5).

disapproval when a person convicted of a very atrocious crime has escaped the death penalty?" (J.A. 6). The request was denied, and counsel registered no specific objection. (Tr. 35).

At the conclusion of the *voir dire* examination, both parties were given the opportunity to exercise peremptory challenges. Defense counsel asserted twenty challenges and the prosecutor exercised eighteen. (Tr. 56–64). During the course of selecting the jury, the prosecutor announced his satisfaction with the existing panel four times. (Tr. 56, 58, 59). Apparently, there were members of the Negro race upon at least two of those occasions. (Tr. 128). The government challenged two members of the white race, and defense counsel challenged twenty. (Tr. 129). The record does not demonstrate whether the final panel included any Negroes. (Tr. 131). Defense counsel moved to declare a mistrial and impanel another jury. His motion was denied. (Tr. 73).

C. The robbery and killing of Harry Honikman

On March 12, 1953, Willie Lee Stewart and several friends spent most of the day playing cards. The game ended at 6:00 p.m. At 7:00 p.m., Stewart went to the home of John W. Hamilton. He wanted Hamilton to resume the game which he and Stewart had been playing earlier. While in Hamilton's home, Stewart received a telephone call. Stewart asked the caller whether the game was still going on, and then indicated that he would be there later. After the telephone conversation, Stewart told Hamilton that he would be unable to continue their game and that he would get Hamilton another partner. (Tr. 314–17).

Hamilton then started playing "bid whist" with Annie Stewart, Julia Daniels, and several others. Shortly after the game commenced, Stewart walked into the room. He was carrying a .38 calibre 5 shot Iver-Johnson pistol. Hamilton asked to see the gun. Before handing it to him, Stewart removed five bullets. He said that it wasn't good policy to give anyone a loaded gun. Hamilton examined the pistol and returned it to Stewart. Stewart then asked his wife to give him some money. She refused and urged him to join the card game. Stewart offered to give her the pistol in exchange for her

watch and he placed the pistol on his wife's lap. When his offer was rejected, he picked up the pistol, reloaded it, stuck it in the front of his belt, closed his jacket over it, and left the house. (Tr. 318–22).

At 9:00 p.m., Stewart entered a grocery store at 723 East Capital Street, Southeast. Edith Honikman [4] and her mother and father were the only people in the store when Stewart entered. (Tr. 113). It was shortly before closing time, and the last customer had just left the store. Stewart purchased a bottle of orange soda and stood next to the door while he drank it. He never lost sight of the store's cash register. After drinking a portion of the soda, he purchased a bag of potato chips. He ate and drank in a leisurely fashion for approximately twenty minutes. (Tr. 115–17). When he finished, he asked for another bottle of soda. He wanted to drink it in the store, but Harry Honikman asked him to take it out because it was closing time. Stewart agreed and asked Honikman to put the bottle in a bag. As Honikman reached under the counter for a bag. Stewart walked toward the center of the store while facing the entrance. (Tr. 137–38). Edith Honikman saw him lift the front of his jacket, "as if he were adjusting his trousers." (Tr. 138).

Harry Honikman walked around the counter toward Stewart to give him his bottle of soda and to lock the door as he left. He was next to his daughter, Edith, when Stewart turned around, pointing a gun toward the father and daughter. Stewart said, "This is it." Honikman, who had defective hearing, did not respond immediately. Stewart was asked whether he wanted money and the mother screamed that he should take it. Without making any reply,[5] Stewart shot Harry Honikman and killed him almost instantly. He ordered the mother to open the cash register. When she refused, he went to the register himself, emptied the drawer of $416.00 in cash, and walked out of the store. Stewart was calm and deliberate during the entire robbery. (Tr. 138–143).

[4] The witness subsequently married. Her name appears in the record as Edith Honikman Burka.

[5] Three to ten seconds elapsed from the time Stewart said, "This is it," until he pulled the trigger. (Tr. 141).

Stewart returned to his house, changed clothes, and resumed his card game. (Tr. 322–24).

D. Evidence on the issue of insanity

Appellant's wife, sister, aunt, cousins, sisters-in-law, brother-in-law, employer, and friends testified in his behalf.[6] They described Stewart's unhappy childhood,[7] related examples of mental illness in his family,[8] attested to his excellent work record,[9] and offered numerous examples of his shortcomings as a husband and father.[10] Stewart was depicted as a vicious man with an uncontrollable temper,[11] a man who always had to have his own way,[12] a man who would tolerate nothing

[6] In Stewart's second appeal to this Court, the significance of this lay testimony was noted:

"The insanity defense, * * * rested, in the final analysis, completely upon the testimony of appellant's relatives and friends, chiefly his wife, concerning his alleged irrational behavior. If the jury disbelieved them, that was the end of the defense, for even Dr. Williams' testimony depended upon the testimony of those witnesses." 101 U.S. App. D.C. at 54.

[7] Stewart's mother left him when he was a young child, and he spent most of his childhood with his grandmother. As a child, he frequently threw his food on the floor, cut up his clothes, and walked in his sleep. He performed poorly in school, was uninterested in his studies, and was frequently truant. His grandmother whipped him frequently. (Tr. 679–82, 784–98, 829–31).

[8] Two of Stewart's aunts and his brother were apparently mentally ill. (Tr. 664–69, 815–16).

[9] Stewart worked as a window washer, a bricklayer, a cement plasterer, and a hod carrier. He had never been fired from a job and his employer considered him an excellent worker. (Tr. 480, 657, 834, 853).

[10] He beat his wife frequently, sat on her stomach and whipped her with a belt when she was pregnant, knocked her down and threatened to kick her when she was pregnant with another child, and once locked his wife and children out of their room. His childrens' crying got on Stewart's nerves. He once threatened to throw his daughter out the window if she didn't stop crying. He beat the child unmercifully and finally had to be restrained. Upon another occasion, the combination of his infant son's crying and his wife's refusal to give him money when he demanded it provoked him to threaten to put his son in a furnace. On one Halloween, Stewart shot at his wife. Several witnesses testified as to each of these incidents. (Tr. 424–42, 509, 531, 543–47, 555, 557, 590, 619–21, 633, 655, 695–98, 721–40, 755).

[11] *Ibid.* Several members of Stewart's family indicated that they were afraid of him. (Tr. 466, 553).

[12] *Ibid.*

which didn't meet with his approval.[13] The witnesses described several acts of violence, provoked and unprovoked, which Stewart had committed.[14] Stewart generally claimed ignorance of these acts, and denied responsibility for his conduct.[15] The police were called to Stewart's home upon several occasions because of his conduct. (Tr. 642). Three times during the course of the trial, a detailed summary of this evidence was presented in lengthy hypothetical questions. (Tr. 916–39, 1116–38, 1869–85).

At the conclusion of this lay testimony, defense counsel announced that he would rest and present his expert witnesses after the government had presented its evidence on the issue of insanity. There was a lengthy discussion between the court and counsel regarding the difference between order of proof and burden of proof. The court then ruled that the defense must exhaust its evidence on the issue of insanity before the government would be compelled to go forward with its proof on that issue. (Tr. 874–884). Defense experts then testified.

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[13] Stewart had a refrigerator in the house where he resided when he killed and robbed Harry Honikman. Other people in the house were accustomed to putting their food in his refrigerator. He ordered them to discontinue this practice. When he came home one day and discovered that his command had not been obeyed, he threw the entire contents of the refrigerator to the floor. (Tr. 446, 502–5, 548–50, 719–21).

When his landlord boarded up the front entrance to his home to prevent children from falling out the door while the porch was being repaired, Stewart refused to enter through the basement entrance as all the other residents did. He tore down the boards, forced his way through the blockaded entrance, and made a regular practice of entering only through the barred entrance. He insisted that it was his right to enter in that fashion so long as he paid his rent. (Tr. 517, 616–19, 741).

Stewart engaged in similar conduct in the Army. When he got tired of standing guard, he simply left his post. When he got bored with being at camp, he "went over the hill." (Tr. 860).

[14] When angry, Stewart threw dishes out the window, tore up his clothes, and punched his fist through various materials. (Tr. 512, 541, 708, 715, 722). When his wife served him food he didn't like, he threw the food to the floor and left home. (Tr. 697). When he knocked on a door and no one answered, he punched his fist through the door panel and entered the room. (Tr. 717). He physically attacked one sister-in-law, (Tr. 538), and threatened to tear apart the house of another. (Tr. 575). He slapped his wife for no apparent reason. (Tr. 583–620). Stewart complained that people didn't like him. (Tr. 551).

[15] (Tr. 511, 517, 584, 724).

Dr. John L. Endacott, a psychologist, examined appellant on May 21, 1962. (Tr. 897). He gave appellant two tests: the Wechsler Intelligence Test and the Rorschach Ink-blot Test. (Tr. 898). Upon the basis of the results on these tests, Endacott concluded that Stewart was a mental defective and that his intellectual and emotional controls were operating very poorly. (Tr. 905–912). In response to a hypothetical question which contained all of the defense evidence on the issue of insanity, Endacott stated that Stewart was a mental defective on March 12, 1953, and that the condition substantially affected his mental and emotional processes and impaired his ability to control behavior. (Tr. 941–43). On cross-examination, the witness admitted that appellant's IQ may have been higher in 1953 than it was in 1962 when he tested him. (Tr. 1016). He also stated that an individual with an IQ of 46, which is the score he gave Stewart, could not play bid whist. (Tr. 1061).

Dr. George W. Sprehn, a phychiatrist, examined appellant on October 27, 1962, for approximately one hour. He found Stewart detached, disinterested, withdrawn and isolated. (Tr. 1110–11). As a result of his examination and the information related to him in a lengthy hypothetical question, Sprehn concluded that Stewart "was mentally ill at the time of the shooting, suffering a disorder with a diagnosis of schizophrenia, mixed type, simple and paranoid features." (Tr. 1138–39). The witness stated that the illness substantially affected mental and emotional processes and impaired behavior controls. (Tr. 1139). Sprehn did not find appellant mentally defective. (Tr. 1150). He stated that a person with a 46 IQ could not learn to read and write, and that it would require an IQ of at least 70 to develop those skills. (Tr. 1222).

Dr. Oscar Legault examined appellant on October 21, 1962. (Tr. 1258). The examination lasted 60 to 90 minutes. Stewart's mood throughout the examination was rather flat. (Tr. 1265). He estimated that Stewart had an IQ "in the vicinity of 70," which would classify him as a borderline mental defective. (Tr. 1267). Legault entertained the opinion that Stewart was definitely mentally ill, although he was not certain of the precise nature of the illness. He concluded that

the most probable diagnosis was "constitutional psychopath of the emotionally unstable type." Appellant was not psychotic at the time Legault examined him, nor did Legault classify him as a mental defective. (Tr. 1274–80).

Dr. Ernest W. Williams examined appellant in 1953, 1958, and 1961. (Tr. 1431). At the second and third interviews, Stewart did practically nothing but yell and scream. Williams was unable to get a very valuable history from Stewart. While Williams had some misgivings about his diagnosis after the first interview, he stated that in his opinion Stewart was suffering from a manic depressive psychosis. (Tr. 1431–38). Williams conducted no tests other than his personal interviews (Tr. 1448), two of which were totally fruitless. (Tr. 1437–39).

In a one hour examination conducted on June 9, 1962, Dr. Richard Herman Kastner found Stewart suspicious, disoriented, withdrawn and hostile. He demonstrated no psychomotor activity, appeared limp, and never changed his facial expression. Although unable to determine the exact etiology of Stewart's disorder, Kastner concluded that in all probability the diagnosis was schizophrenic reaction, paranoid type. (Tr. 1606–16).

Dr. Leon Salzman interviewed appellant twice—on April 9, 1962 and May 26, 1962. Stewart was dull, listless, apathetic and confused with Salzman. (Tr. 1684). The first interview lasted for 35 minutes and the second for 27 minutes. From his interviews and the information in the hypothetical question, Salzman concluded that Stewart was suffering from a mental disease in March of 1953, and that his crime was a product of that disease. (Tr. 1687, 1712). His diagnosis of Stewart's malady was "mental deficiency with psychosis and/or schizophrenia, with marked deterioration." (Tr. 1687).

The government introduced lay and expert testimony on the issue of insanity. William H. Fountaine testified that he had known Stewart for a number of years before he killed Harry Honikman, that he saw Stewart three or four times a week, that Stewart was an excellent card player, and that he never saw Stewart act in a peculiar or bizzare fashion. (Tr. 1565–75). The classification intern who interviewed Stewart

on his admission to jail on March 17, 1953, described the circumstances of that interview. At that time, Stewart gave detailed information regarding his prior employment, the names, addresses, and occupations of members of his family, and the nature of his military experience. (Tr. 1794–1802). He knew that he was charged with murder and robbery, and he suggested that he was innocent—that he had been playing cards and drinking beer at the time of the killing. (Tr. 1802).

Charles Rogers, a cell block officer at the District Jail when Stewart was admitted, saw Stewart on a daily basis in 1953. Stewart participated regularly in recreation, kept his cell clean, and did nothing unusual during the period Rogers knew him. (Tr. 1972–76). Another jail officer gave similar testimony. (Tr. 2068–69). Stewart wrote letters while he was in jail and requested permission to use Title 28 of the United States Code and Title 22 of the District of Columbia Code. (Tr. 2076–2092).

Four psychiatrists testified that appellant was sane on March 12, 1953. Dr. Morris Kleinerman examined Stewart on March 25, 1953, for approximately two hours. He found Stewart's conversation coherent and relevant. Stewart informed Kleinerman that he drank on weekends and that he had once been arrested for being drunk. Stewart's memory was intact. Kleinerman's opinion that Stewart was not suffering from any mental illness was unchanged by the facts related to him in a hypothetical question which contained the lay testimony offered at trial. (Tr. 2122–2139).

In an interview with Dr. Elmer Klein, on March 26, 1953, Stewart was amiable, responsive and pleasant. He gave Klein a history of his life from the time of childhood. Klein observed nothing unusual about his conduct or his conversation. He found Stewart capable of solving simple arithmetical problems. Klein concluded that Stewart was not suffering from any mental disease or defect, and his opinion was unaffected by the hypothetical question related to him. (Tr. 2092–2106).

Stewart was at St. Elizabeths Hospital for a period of 120 days, commencing on December 16, 1957. Dr. Morris M. Platkin had an opportunity to observe him during that period.

It was found that Stewart mixed well with other patients, enjoyed playing cards, checkers, and watching television, that he ate well and cared for his personal needs satisfactorily. Dr. Platkin offered the opinion that Stewart was malingering when examined at the hospital, and that he was free of mental illness at that time and on March 12, 1953. (Tr. 1984–2025).

Dr. John Cavanaugh also concluded that Stewart was a malingerer. After three interviews and examination of hospital tests, he reached the opinion that Stewart was suffering from no mental disease or defect. He found that Stewart refused to cooperate on neurological and psychological tests, that he intentionally avoided answering questions, and that his experience with psychiatrists and psychologists was being employed to feign illness. (Tr. 1845–85).

E. Instructions

The court informed the jury that an individual is not responsible for his criminal act if the act was a product of mental disease or defect. (Tr. 2259). "Disease or defect" was defined as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." (Tr. 2260). The jury was explicitly told four times that the burden was upon the Government to prove sanity beyond a reasonable doubt. (Tr. 2257, 2258, 2261–62).

The court briefly summarized the evidence on the issue of insanity. (Tr. 2265–71). The jury was told five times that the determination of the facts was exclusively for the jury, and that the court's recollection was not binding upon the jury. (Tr. 2246–47, 2250, 2264–65, 2271).

The jury was instructed that it might return a verdict of "guilty as charged," in which case the defendant would be sentenced to death, or that it might qualify its verdict by recommending life imprisonment by unanimous vote. The court informed the jury that if it could not agree unanimously on the question of punishment, it should report its disagreement to the court. (Tr. 2253–54, 2272).

The court did not instruct on the offense of second degree murder, nor was it requested to do so.

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2404, provides, in relevant part:

> The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment.

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I

Any delay in this case, not requested by appellant, has been reasonably attributable to the ordinary processes of justice. Time consumed by appellate review does not constitute "unnecessary delay." Dismissal of the indictment against appellant, a man whom four juries have convicted of first degree murder, can be accomplished only by ignoring the "rights of public justice" and permitting appellant to reap undeserved

reward for the inconvenience caused him by the scrupulous manner in which his rights have been protected. This "inconvenience" has enabled appellant to obtain the services of four additional expert witnesses and to secure other benefits. Appellant has profited immensely by the delays afforded him. His constitutional right to a speedy trial has not been violated.

II

Appellant should not be permitted to rely upon defense trial strategy as a basis for reversal. In appellant's fifth trial for murder while perpetrating a robbery, the government relied upon essentially the same testimony to prove the offense as had been relied upon in all previous trials. A second-degree-murder instruction was never given in any prior trial. It was neither requested nor given in the trial presently appealed. Appellant had nothing to gain and something to lose by the submission of second degree murder to the jury. In these circumstances, where appellant was familiar with the government's evidence and where the defense had compelling reasons for acting as it did, the absence of a request for a second-degree-murder instruction precludes appellant from asserting his right to such an instruction on appeal.

There was no competent evidence relevant to the issue of second degree murder. The testimony demonstrated conclusively that appellant killed while perpetrating a robbery. He shot his victim moments before he emptied his victim's cash register. The robbery and killing were part of a single integrated transaction. Upon this evidence, the trial court had no justification for instructing on second degree murder.

III

The trial court properly rejected defense counsel's assertion of the right to present all expert psychiatric testimony after the government had gone forward with its evidence on the issue of insanity. In compelling defense counsel to present this testimony before the government went forward, the court was merely exercising its discretionary authority to control the order of proof. The action taken by the court to secure com-

pliance with its ruling on this matter provides no basis for reversal.

IV

The court repeatedly instructed the jury that the government must prove sanity beyond a reasonable doubt. It was never suggested that any affirmative findings were necessary to a verdict of not guilty by reason of insanity. Viewed in its entirety, there is nothing confusing or misleading about the court's instruction on insanity. It accurately stated the test for criminal responsibility and the burden of proof applicable to that test.

The jury was informed that mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. It was told that it was not bound by the opinions of experts in reaching its decision on the issue of mental condition. The relationship which must exist between the mental condition, if any, and the act charged was adequately explained. In charging on the issue of insanity, the trial court complied fully with rules announced by this Court.

V

The trial judge gave a fair and accurate statement of the evidence on the issue of insanity in an impartial, dispassionate and judicial manner. By clear and specific language, he informed the jurors five times that they should exercise their independent and untrammeled judgment in determining the facts. He repeatedly stated that his recollection was not binding upon the jury. The court has no duty to become an advocate for the accused. Error cannot be predicated upon its failure to perform that role.

VI

In unmistakable terms, the jury was informed that it had the power to recommend life or death for the accused, and that either recommendation must be by unanimous vote. The court properly refrained from advising the jury of the possible consequence of its failure to agree unanimously on the ques-

tion of punishment. Had the court done otherwise, it would have removed the primary responsibility for determining punishment from the jury. No effort was made to limit or define the jury's discretion regarding punishment. In all respects, the court's instruction on this issue was proper.

VII

Appellant's right to a fair trial was not violated by the prosecutor's exercise of peremptory challenges. Counsel is free to assert peremptory challenges in any manner he deems proper. To hold otherwise would be to deprive the government of its right to challenge without cause. Furthermore, the record does not establish the facts asserted by appellant—it does not demonstrate a systematic attempt by the prosecutor to exclude Negroes from the jury.

VIII

The trial court has no duty to explore all possible areas of juror disqualification, absent a request from counsel. Here, defense counsel was asked to submit the questions he wished to propound to prospective jurors. No question was submitted relating to possible bias in favor of capital punishment. In these circumstances, the right to make that inquiry is waived. Appellant may not assert the absence of an unrequested inquiry as a basis for reversal.

IX

Four defense psychiatrists examined appellant at or near the time of trial—ten years after appellant killed and robbed Harry Honikman. These psychiatrists observed and relied upon appellant's current physical appearance and demeanor in reaching their opinions regarding his mental condition on March 12, 1953. This testimony put in issue appellant's appearance and demeanor at the time of trial and fully justified the prosecutor's comment upon the physical appearance of the accused in court. The prosecutor's summation was entirely within the limits of effective advocacy.

ARGUMENT

I. Appellant's right to a speedy trial has not been violated.

A. There has been no unnecessary delay between trials.

Appellant has been tried five times. He has been convicted and sentenced to death four times. His case has been reversed twice by this Court and once by the Supreme Court of the United States.[16] There is no allegation of unreasonable delay between the times his convictions were reversed and the times his new trials commenced. Upon these facts, the issue plainly presented is whether, in a capital case, delay caused by three trials, three convictions, three reversals and one mistrial, operates as a denial of the accused's right to a speedy trial, where he benefits from the delay?

The government has been unable to find a single case in which time consumed by conviction and reversal has been considered anything other than delay which "is reasonably attributable to the ordinary processes of justice." *Williams* v. *United States*, 102 U.S. App. D.C. 51, 53, 250 F. 2d 19, 21 (1957). In *Euziere* v. *United States*, 266 F. 2d 88 (10th Cir. 1959), *vacated on other grounds*, 364 U.S. 282 (1960), it was contended that delay caused by conviction and reversal rendered a subsequent trial objectionable on the ground that it wasn't speedy. The Court dismissed the contention summarily:

> Merely to note the reason for the time intervening between the date of the first trial and second trial refutes the contention that the Government was dilatory in bringing appellant to trial. Citation of authorities would add nothing of value to what has been said. Neither would a detailed discussion of the question be helpful. 266 F. 2d at 91.

Denial of speedy trial cannot be alleged where there is no unnecessary delay between the date of remand and the commencement of a new trial. After reversal, an "essential inquiry" is "whether there was unnecessary delay in bringing

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[16] *Stewart* v. *United States*, 94 U.S. App. D.C. 293, 214 F. 2d 879 (1954); 101 U.S. App. D.C. 51, 247 F. 2d 42 (1957); 107 U.S. App. D.C. 159, 275 F. 2d 617 (1960), *rev'd.*, 366 U.S. 1 (1961).

about the new trial." *United States* v. *Gunther*, 104 U.S. App. D.C. 16, 17, 259 F. 2d 173, 174 (1958). Upon that issue, appellant makes no pertinent allegations. His entire argument is predicated upon delay caused by reversals. Such delay does not operate to protect appellant from prompt prosecution for the heinous offense which he committed.

The facts in this case are substantially and significantly different from those presented in *Williams* v. *United States, supra.* Williams was indicted for assault with a deadly weapon; appellant, for murder. The maximum sentence imposed upon Williams in any of his trials was three to nine years; appellant has received nothing less than death. In *Williams*, the government was at least partially responsible for a lengthy delay between trials; [17] no such responsibility is alleged here. Appellant has requested or acquiesced in any delays between trials in this case, and he cannot assert that such delays deprived him of a speedy trial. As the Supreme Court has stated,

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905).

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[17] Appellant claims that he was prejudiced by virtue of a four-and-one-half-year delay between indictment and the time when appellant had his first complete mental examination. (Br. 61–62). It is asserted that this delay was caused by the government. The assertion is not supported by fact.

Prior to appellant's first trial a motion to determine present mental competency had been denied on the basis of "psychiatric examinations procured by the United States Attorney which found the accused to be of sound mind and capable of participating in his defense." The Court noted that under 18 U.S.C. 4244, then generally operative in the District of Columbia, the trial court should procure a mental examination in an appropriate case. Reversal, however, was on other grounds. 94 U.S. App. D.C. 293, 294, n. 2.

Before the second trial the prosecution had reminded the defense that there should be an application for the determination of present mental competency unless the defense felt appellant was presently of sound mind. Record, p. 244, D.C. Cir. No. 12944. On January 12, 1955, when the case came on for trial the second time, defense counsel unequivocally stated to the court that he was not "making any motion for any inquiry or examination at this time." *Id.* at 246. In explanation the defense recounted that while two Government psychiatrists had found appellant sane, Dr. Williams' examination in itself had been inconclusive and that an opinion that appellant was psychotic was possible only in conjunction with additional facts

Dismissal of the indictment against appellant, a man whom four juries have convicted of first degree murder, can only be accomplished by ignoring the "rights of public justice" and permitting appellant to reap undeserved reward for the inconvenience caused him by the scrupulous manner in which his rights have been protected.

B. Appellant has profited by the necessary delays.

Contrary to appellant's contention that he has been prejudiced by the passage of time, the facts clearly demonstrate that he has profited. Appellant was last tried under a far more liberal rule of criminal responsibility than existed at the time he was indicted. He had an opportunity to escape the death penalty, even if convicted, which was not available until 1962. 22 D.C. Code § 2404 (Supp. II, 1963). The fact that some of his own witnesses have become unavailable is more than counterbalanced by the death of one of the eyewitnesses to the offense, and by the manner in which time tends to reduce the horror of his deed. Through the years, appellant has acquired the services and testimony of five expert witnesses who made no appearance in his 1953 trial. It appears that appellant has profited far more than he has lost by the fortuity of three reversals, one mistrial, and the passage of years. The circumstances of the case simply do not support the allegations of prejudice upon which appellant predicates his demand for dismissal of the indictment on the ground of denial of speedy trial.

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submitted to him in the form of a hypothetical question. While not conceding present soundness of mind, defense counsel stated: "I reached the conclusion that the conditions had not changed. In other words, in my opinion, his mental condition is the same now as it was at the time of the prior examination by the psychiatrists. I felt it would be futile to ask the Court to have another examination of the man * * * I feel I am doing my duty by this man. I don't feel I have been neglectful of my duty by not filing the application." *Id.* at 245.

A lack of communication between appellant and his attorneys was first advanced by new counsel subsequent to the reversal of the second conviction. In October, 1957, a motion for determination of mental competency was filed asserting that appellant, in interviews, exhibited "an almost total absence of memory of past events." Received at Saint Elizabeths Dec. 16, 1957, on April 16, 1958, appellant was reported as presently of sound mind.

II. The trial court acted properly in not giving a second-degree-murder instruction.

A. Failure to request the instruction, in the circumstances of this case, constitutes a waiver of the right to the instruction.

Appellant has been before this Court on three prior occasions, for review of three prior convictions.[18] In all previous trials the evidence relevant to the circumstances of the crime itself has been virtually identical; in none was a second-degree-murder instruction given. That the evidence warranted such an instruction has been urged upon this Court before. (Brief of *Amicus Curiae,* D.C. Cir. No. 11891, p. 69). While that issue was not expressly decided, this Court apparently dismissed the contention as groundless when it stated: "The only substantial ground urged for reversal on this appeal relates to the court's instructions to the jury on the defense of insanity." 94 U.S. App. D.C. 293, 294, 214 F. 2d 879, 881 (1954). In appellant's fifth trial, now before this Court for review, the Government relied upon essentially the same testimony to establish the facts and circumstances of the offense as had been relied upon in all previous trials. Defense counsel, whose skill and ability is amply demonstrated by the record, represented appellant in the fourth trial of this case. Transcripts of four previous trials were available for examination and study by defense counsel. In these circumstances, it must be assumed that the strategy and tactics of the trial were carefully considered and thoroughly planned. It cannot be assumed that any rights were waived through carelessness or inadvertence. Consistent with the underlying rationale of Rule 30 of the Federal Rules of Criminal Procedure, the Government submits that failure to request an instruction should be deemed an intentional waiver of the right to the instruction. In the instant case, there was no request for an instruction on second degree murder, nor was there any objection to its omission.

Defense counsel's failure to act in this regard is persuasive evidence that it was deemed advisable not to act, particularly where, as here, a second degree murder instruction may have

[18] *Stewart* v. *United States*, 94 U.S. App. D.C. 293, 214 F. 2d 879 (1954); 101 U.S. App. D.C. 51, 247 F. 2d 42 (1957); 107 U.S. App. D.C. 159, 275 F. 2d 617 (1960), *rev'd*, 366 U.S. 1 (1961).

been considered undesirable. The jury had several verdicts available other than guilty as charged or not guilty. *Compare, Coleman* v. *United States*, 111 U.S. App. D.C. 210, 295 F. 2d 555 (1961), *cert. denied*, 369 U.S. 813 (1962). To add another possible verdict, which carries a sentence substantially the same as a recommendation of life imprisonment, would serve no useful purpose. See 22 D.C. CODE § 2404 (Supp. II, 1963). On the other hand, the availability of such a verdict might increase the possibility of compromise and lessen the probability of a verdict of not guilty by reason of insanity. Even in a capital case, sound trial strategy should not be established as a technique by which a trial court may be led into error. See *Jackson* v. *United States*, D.C. Cir. No. 16, 879, decided December 20, 1962.[19] On this ground alone, appellant's first contention should be rejected.

B. The evidence did not warrant an instruction on second degree murder.

Appellant was charged with killing a man while perpetrating a robbery. This Court has already recognized that the evidence "made it unmistakable that, if the appellant was legally sane, he was guilty of the homicide charged against him." [20] The evidence demonstrated that appellant played cards during most of the day on March 12, 1953. He decided to go to another card game that evening. Before leaving his home, he furnished himself with an Iver-Johnson 5 shot pistol, asked his wife to give him some money, and left when she refused. (Tr. 315–22). He entered Harry Honikman's grocery store at about 9:00 p.m., calmly drank a bottle of soda and ate a bag of

[19] Counsel's strategy was plainly indicated by the following stipulation which was offered in the fourth trial of this case:

"It is expressly stipulated * * * that the defendant committed the acts charged in the indictment, that is to say, shot and killed Harry Honikman in and while perpetrating a robbery as charged in the indictment, and that it will not be necessary for the Government to produce any evidence in support thereof. The defense will be insanity." (Criminal No. 633–53, Transcript of Proceedings, February 19, 1962, p. 6).

[20] 101 U.S. App. D.C. 51, 52. See also 94 U.S. App. D.C. at 294: "There is not the slightest doubt from the evidence * * * that he committed the offense."

potato chips, waited until the store was about to close, ordered another bottle of soda, and then shot and killed Harry Honikman and took $416.00 from a cash register while his victim's wife and daughter helplessly observed. (Tr. 112–17, 135–60). Unlike another murderer who expressed his intentions more precisely by saying, "This is a hold-up," before killing his victim, *Goodall* v. *United States,* 86 U.S. App. D.C. 148, 149, 180 F. 2d 397, 398, *cert. denied,* 359 U.S. 987 (1950), Stewart merely said, "This is it." (Tr. 139). Any ambiguity which may have existed in Stewart's threat was immediately removed by his subsequent actions. He shot his victim within three to ten seconds after making his announcement, ordered his victim's wife to give him the contents of the cash register and, when she refused, went to the register himself and filled his pockets as quickly as his condition would allow—he was using one hand to keep a pistol aimed at the wife and daughter of his victim. (Tr. 139–42).

Only one reasonable conclusion can be drawn from these facts. The killing and emptying of the cash register which followed "were all part of the same transaction. They were so closely connected in point of time, place, and continuity of action as to be one continuous transaction." *Bizup* v. *People,* 371 P. 2d 786, 788 (S. Ct. Colo. 1962). All the defendant's acts, from the time he entered the store until he cold bloodedly shot his victim and emptied the cash register, were part of one continuous integrated attempt to successfully complete his crime. The crime was robbery. The killing which occurred during the perpetration of that crime was first degree murder and nothing else. See *Hansborough* v. *United States,* 113 U.S. App. D.C. 392, 308 F. 2d 645 (1962) *Goodall* v. *United States, supra.* Upon these facts, there is no evidence relevant to the issue of second degree murder, and an instruction on that issue was not required by the proof adduced.

The evidence which appellant now relies upon in asserting his right to an instruction on second degree murder is the testimony of a defense psychologist. (Br. 13–14). The psychologist testified that robbery was a motive "presumably, some time after he shot the man," and that "quite possibly" Stewart shot because "he was a frightened man responding to persecut-

ing voices." (Tr. 1051). This testimony provides no basis for a conviction of second degree murder and no evidentiary foundation for an instruction on that offense. If the jury had believed that Stewart killed because "he was a frightened man responding to persecuting voices," it would have had no evidence upon which to predicate a verdict of guilty of second degree murder. The necessary verdict would have been not guilty by reason of insanity. The psychologist's testimony was not based upon reasonable probability. He admitted that he had no evidence that Stewart was actually responding to voices. (Tr. 1051). Nor was the statement that the intent to rob occurred after Stewart killed asserted as an opinion based upon probability. Defense counsel did nothing to develop this testimony to the point where it might be considered competent evidence upon which to base a request for a second-degree-murder instruction. As stated, the testimony was unsupported by fact and unsubstantiated by the degree of certainty which the law requires to render opinion testimony competent. See *Martin* v. *United States*, 109 U.S. App. D.C. 83, 284 F. 2d 217 (1960). It gave the trial court no basis for ignoring this Court's frequently stated admonition that a second-degree-murder instruction should not be given in a felony-murder case in the absence of special circumstances. *Coleman* v. *United States, supra; Goodall* v. *United States, supra; Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F. 2d 856 (1955). No such circumstances exist in the present case.

III. In compelling defense counsel to present expert testimony on the issue of insanity before the Government presented its evidence on that issue, the trial court properly exercised its discretionary power to control the order of proof.

In a motion for new trial filed on November 16, 1962, appellant asserted that the trial court had erred "in depriving the defendant of adequate representation by compelling counsel for the defendant against his judgment and under pain of contempt to call all witnesses on the issue of insanity *at a time chosen by the Court and not by counsel for the defendant.*" (J.A. 13, emphasis supplied). Appellant now abandons the assumption implicit in this motion—the assumption that a

trial court is powerless to control the order of proof at trial. Abandonment of that assumption is plainly dictated by the many decisions of this Court which have upheld the trial court's discretionary authority to control the order of proof. *E.g., Hoeppel* v. *United States,* 66 App. D.C. 71, 85 F. 2d 235 (1936). Perhaps defense counsel would have reached a similar conclusion if he had had the opportunity for sober and relaxed reflection. At trial, however, he did not agree with the court. He manifested his disapproval of the court's view by repeatedly instructing the court that he would comply with its ruling only under pain of contempt. (Tr. 883–84, 1102). His defiant invitation was finally accepted with great reluctance. (Tr. 1103).

This entire controversy arose out of defense counsel's desire to rest upon the presentation of lay testimony on the issue of insanity, saving the testimony of six experts until after the government had presented its evidence on that issue. Counsel indicated that he intended to call several psychiatrists, but only after the government produced its evidence. There was a lengthy discussion between the court and counsel regarding the difference between order of proof and burden of proof. The court then ruled that the defense must exhaust its evidence on the issue of insanity before the government would be compelled to go forward with its proof on that issue. (Tr. 874–884). Appellant does not now attack the court's ruling on the question of order of proof, nor could he successfully do so. See *Carey* v. *United States,* 111 U.S. App. D.C. 300, 302, 296 F. 2d 422, 424 (1961).

The government fully agrees with appellant that the issue now involved is much greater than the mere question of the court's right to control the order of proof. Because of defense counsel's open defiance to the court's ruling on that simple question, defiance apparently based upon a sincere desire to preserve his objection to the court's ruling, the issue was magnified. As final clarification of its ruling, the court stated:

> I am not compelling you to produce any witness. I am ruling that you must produce them now or not at all. (Tr. 891).

Defense counsel replied that he would not produce his witnesses and that he would be willing to take "whatever risk that involves." [21] (Tr. 891). Taking a somewhat less adventuresome attitude toward the proceedings, the court announced:

> No, I am not going to permit you to do that. This is a capital case and I am not going to permit you to play chess or play poker with the Court.
>
> I direct you to produce all of the evidence that you have available on the issue of insanity. (Tr. 891).

Defense counsel then asked the court to declare a mistrial on the ground that the court's ruling deprived the accused of his right to the effective assistance of counsel. (Tr. 892).

The only significant issue which developed from this colloquy involves the power of a judge to secure compliance with his rulings, to protect the dignity of the court, to promote the interests of justice by compelling the production of evidence indispensable to the assertion of the accused's defense, and to prevent the trial court from becoming nothing more than a practice forum for the expression of views directed to the Court of Appeals. Faced with defense counsel's refusal to comply with its ruling, the trial court had three alternatives available: (1) To retreat from its ruling and grant defense counsel's request; (2) To enforce its ruling, permit the defense to rest, and strictly limit the defense experts to rebuttal testimony, if the government decided to go forward; and (3) To compel the defense to call its experts before the government went forward.[22] The court properly chose the third alternative, recognizing the drastic consequences of any other action. To retreat from its ruling would be to surrender judicial authority to defense counsel—an action which would constitute open recognition of judicial impotence. Such action is unthinkable. A court which is powerless to enforce its rulings is no court at all. The sec-

[21] Counsel assumed that he had introduced sufficient evidence to raise the issue of insanity. *Smith* v. *United States*, 106 U.S. App. D.C. 318, 272 F. 2d 747 (1959), casts some doubt upon that assumption.

[22] The possibility of calling the experts as witnesses of the court was precluded by defense counsel's refusal to examine the experts, except under pain of contempt. (Tr. 1103).

ond alternative is equally defective. Willie Lee Stewart was charged with first degree murder. If convicted, he faced possible death. 22 D.C. CODE § 2404 (Supp II, 1963). His sole defense was insanity. Six expert witnesses were available to testify in his behalf. For the court to permit anything but the fullest development of the testimony of those experts would be diametrically opposed to the interests of justice. *Burgman* v. *United States*, 88 U.S. App. D.C. 184, 188 F. 2d 637, *cert. denied*, 342 U.S. 838 (1951). Yet that was the result defense counsel demanded when he refused to call his experts and offered to take whatever risk might follow. In these circumstances, the trial court chose the only practical solution to a dilemma which should never have been created. His action provides no basis for reversal.

IV. The court's instruction on the issue of insanity was accurate in all respects and fully responsive to the issues presented by the facts.

A. The trial court clearly instructed the jury that the burden was upon the Government to establish appellant's sanity beyond a reasonable doubt.

Fragmentation of an instruction on the complex issue of insanity renders rational analysis impossible. *Martin* v. *United States*, 109 U.S. App. D.C. 83, 284 F. 2d 217 (1960). An insanity instruction must be examined in its entirety to determine whether it 1) accurately apprised the jury of the essential elements of the insanity defense, and 2) adequately set forth the burden of proof relevant to such elements. *Martin* v. *United States, supra.* So examined the trial court's instruction in the instant case provides no basis for reversal. The procedural aspects of the defense and its substantive elements were stated accurately and without confusion.

Appellant extracts portions of an eight-page instruction on the issue of insanity and contends that they are confusing. (Br. 18–23). Viewed separately, the portions lifted are inadequate because incomplete. Examined in context, the language challenged is entirely proper. Four times in the course of its instruction, the court elaborated upon the Government's bur-

den of proof with regard to the insanity issue.[23] Repeatedly, the jury was informed that the Government must prove sanity beyond a reasonable doubt and that if the Government did not sustain its burden, the jury must find the accused not guilty by reason of insanity. (Tr. 2257, 2258, 2261–62). The legal accuracy of these instructions is beyond question. *Davis* v. *United States*, 160 U.S. 469 (1895).

After explicitly placing the burden of proof upon the Government, the court accurately stated the test announced in *Durham* v. *United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954):

> The law prescribes the following test of mental responsibility for a criminal offense: First, was the defendant suffering from some mental disease or from some mental defect? And, second—and this is very important—if he were suffering from a mental disease or mental defect at the time of the commission of the crime,

[23] The court made the following statements:

"In case the defendant's sanity is in issue, as it is in this case, the Government has a twofold burden of proof. First, as I have indicated, the Government must prove beyond a reasonable doubt that the defendant committed the crime charged in the indictment; second, the Government must prove beyond a reasonable doubt that the defendant was mentally responsible for the crime with which he is charged * * * (Tr. 2257).

"If, however, it is established that the defendant committed the crime, but it is not established beyond a reasonable doubt that he was mentally responsible for the crime, then the jury must find him not guilty on the ground of insanity * * * (Tr. 2258).

"As I have already indicated to you, the burden of proof in this issue, as on all other issues in the case, is on the Government. In other words, in order that the defendant may be found guilty as charged the Government must prove beyond a reasonable doubt that the defendant did not have any mental disease or mental defect at the time of the crime, within the meaning of those words that I have given you, or that even if he had been suffering from a mental disease or mental defect, that the crime was not the product of such mental disease or mental defect. (Tr. 2261–62).

"Of course, every person is presumed to be sane until the contrary appears. This presumption is founded on human experience. However, as I have indicated to you, this presumption does not mean that the burden of proof is on the defendant to prove insanity. In cases in which insanity is properly in issue, as it is in this case, the burden is on the Government on the issue of insanity or mental capacity, just as it is on every other issue in the case, and that burden must be sustained beyond a reasonable doubt." (Tr. 2262).

was the crime a product of that mental disease or mental defect? (Tr. 2259–60).

The court then suggested that an affirmative answer to both questions would relieve the defendant of responsibility for his offense. (Tr. 2260). Following this statement, the jury was advised two more times that the burden of proof was upon the Government to prove the negative of either one of these questions beyond a reasonable doubt. (Tr. 2261–62). Construed in the context of the surrounding instructions regarding burden of proof, an affirmative answer to the questions presented by the court would mean: Yes, there is a reasonable doubt that the defendant was suffering from a mental disease or defect, and that his act was a product of much disease or defect. The instruction contained no suggestion that the burden of proving insanity was upon the defendant. *Compare, Blocker* v. *United States,* 110 U.S. App. D.C. 41, 288 F. 2d 853 (1961).

Appellant's contention that the above-quoted language completely vitiated four proper instructions on the burden of proof assumes that a trial court errs if it states the test for responsibility and the burden of proof applicable to that test separately. That assumption is incorrect. *Carter* v. *United States,* 102 U.S. App. D.C. 227, 233, 252 F. 2d 608, 614 (1957). The trial court's accurate statement of the burden of proof in terms of the rule announced in *Davis* v. *United States, supra,* combined with a proper statement of the test for responsibility prescribed by this Court in *Durham* v. *United States, supra,* gives rise to no legitimate objection.

At the conclusion of the insanity instruction, the court informed the jury that it must consider whether a disease or defect existed and, if so, whether the act was a product of that condition.[24] The court's language is not significantly different

[24] The court stated: "The question whether the defendant at the time of the commission of the crime was suffering from a mental disease or mental defect and the question whether, if that be the case, the crime was a product of such mental disease or mental defect, is for the jury to determine. The decision of the jury cannot be controlled by expert opinions. Otherwise, we would have a trial by experts instead of a trial by jury. The jury must determine for itself, from all of the testimony, lay testimony and expert testimony, and you must consider both, whether a mental disease or defect existed and, if so, whether the crime was the product of that condition." (Tr. 2264).

from that contained in the suggested instruction in *Durham* v. *United States, supra,* 94 U.S. App. D.C. at 241, 213 F. 2d at 875.[25] It contained no suggestion that the jury "might resolve the issue of insanity by a mere balancing of the evidence." (Br. 20). It is far less suggestive of that position than was the trial court's instruction in *Misenheimer* v. *United States,* 106 U.S. App. D.C. 220, 271 F. 2d 486 (1959), where a statement that the jury "must first find two elements present" before it might acquit by reason of insanity was held not to warrant reversal of a second degree murder conviction. (D.C. Cir. No. 14,974, J.A. 200).[26] The instruction here is more explicit and accurate than that given in *Bailey* v. *United States,* 101 U.S. App. D.C. 236, 248 F. 2d 558 (1957), *cert. denied,* 355 U.S. 919 (1958) where it was held that the insanity issue had been "properly submitted" to the jury upon an instruction that "it must appear" that the defendant's act was a product of disease or defect to warrant an acquittal by reason of insanity. *Id.* at 239, 248 F. 2d at 661. The trial court properly conveyed the thought expressed in *Hawkins* v. *United States,* D.C. Cir. No. 16,744, decided November 1, 1962, that the "ultimate issues" for the jury are "whether the evidence shows the existence of a mental disease" and "whether the defendant's act was the product of the mental disease, if one be found to exist." *Id.*, slip opinion, p. 5. An instruction so accurately reflective of the opinions expressed by this Court does not warrant reversal.

Blocker v. *United States, supra,* and *Isaac* v. *United States,* 109 U.S. App. D.C. 34, 284 F. 2d 168 (1960), relied upon by appellant, are inapposite. Both cases contained patently erroneous instructions which plainly informed the jury that the

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[25] The suggested instruction in *Durham* was stated, in part, as follows: "Thus, your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such abnormality and the act. These questions must be determined by you on facts which you find to be fairly deducible from the testimony and the evidence in this case."

[26] Unlike the charge in the instant case, the charge in *Misenheimer* v. *United States, supra,* contained only two brief references to the burden of proof on the insanity issue and it described disease and product as "requirements" of the defense of insanity. (D.C. Cir. No. 14,974, J.A. 190–201).

burden of proof on the issue of insanity was upon the defendant. The instructions in both cases required affirmative findings to support a verdict of insanity. In *Blocker*, the "words 'where it is found,' 'you must find' and 'if you find' informed the jury that the burden of convincing them—which is the burden of proof—was on the defendant." 110 U.S. App. D.C. at 43, 288 F. 2d at 855. Similar language required reversal in *Isaac* v. *United States, supra.* See also *Wright* v. *United States,* 102 U.S. App. D.C. 36, 250 F. 2d 4 (1957). There is no such language in the instant case. Never did the court place the burden of proof on the defendant; there were no patently erroneous instructions. All that can be said of the instructions which appellant attacks is that they would not be sufficient if standing alone—it cannot be said that they were patently improper. But the challenged instructions did not stand alone. They were accompanied by four detailed, complete and accurate statements of the burden of proof on the insanity issue. Appellant's argument that the jury might have been confused in these circumstances must be based upon the assumption that jurors are stupid—an assumption which has gained acceptance in no federal court. The charge is far less suggestive of the interpretation placed upon it by appellant than were the instructions approved by this Court in *Bailey* and *Misenheimer, supra.* This Court's appraisal of the trial court's charge in *Martin* v. *United States,* 109 U.S. App. D.C. 83, 284 F. 2d 217 (1960), is equally applicable here:

> He made clear, without complicating it, the rule laid down in the Davis case by the Supreme Court, that in a case where evidence of the sort here offered by the defendant was received, the *burden* was upon the Government to prove the sanity of the accused beyond a reasonable doubt. He repeated that instruction several times. He correctly stated in clear terms the *concept* laid down by this Court in the *Durham* case as to the determination of mental responsibility for crime * * *. We find no error in these instructions. *Id.* at 86, 284 F. 2d at 220. [Emphasis supplied.]

B. The trial court accurately defined the test for criminal responsibility in the precise language suggested by this Court in the McDonald decision, properly informed the jury that it was not bound by expert opinions, and adequately instructed the jury on the required nexus between mental condition and the Act charged.

1. An instruction which defines disease or defect as this Court defined those terms in McDonald v. United States is entirely proper and sufficient.

For eight years, courts of the District of Columbia applied the "disease-product" test without benefit of a judicial definition of the term "disease." To remedy that situation, this Court provided clarification of the term in *McDonald* v. *United States* D.C. Cir. No. 16,304, decided October 8, 1962:

> * * * [T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. *Id.*, slip opinion, p. 7

Approximately five weeks after the *McDonald* decision was announced, the trial court in the instant case accepted the guidance provided by the decision and instructed the jury in the precise language suggested by this Court. (Tr. 2260–61). Appellant contends that the instruction constitutes reversible error.

Appellant's contention assumes that "this Court in *McDonald* was not attempting to provide an all-inclusive definition of mental disease or defect" (Br. 26). That assumption ignores or rejects the remark made by this Court in introducing the definition:

> Our eight-year experience under *Durham* suggests a *judicial* definition, however broad and general, of what is included in the terms "disease" and "defect." *Ibid.*

It is difficult to conceive of any abnormality which might serve to relieve a man of criminal responsibility which would not come within the prescribed definition. Appellant suggests that a person may be acting under the influence of "an insane delusion" which would leave his capacity for control unimpaired. However, if his behavior were influenced by the delusion, if he acted in a particular fashion because of the delusion, his be-

havior controls have been impaired. The *McDonald* definition provides a broad legal definition of disease or defect—a definition which takes into account any substantial impairment of cognitive and volitive faculties. An instruction in terms of that definition adequately and completely informs the jury of the meaning intended by the words disease or defect. *Cf., Campbell* v. *United States,* 113 U.S. App. D.C. 260, 279, 307 F. 2d 597, 616 (1962) (dissenting opinion). Error cannot be predicated upon such an instruction.

2. The jury was properly informed that it was not bound by expert opinions or psychiatric classifications of mental disorders.

After indicating that some abnormalities would not relieve an individual of criminal responsibility, the court stated the *Durham* test and defined "mental disease or defect" in accordance with *McDonald.* (Tr. 2259–61). The purpose of giving that definition is to inform the jury that what constitutes a disease or defect for clinical purposes to a psychiatrist may not constitute a disease or defect for purposes of determining criminal responsibility. *McDonald* v. *United States, supra,* slip opinion, p. 7. Finally, the court stated, "The decision of the jury cannot be controlled by expert opinions." (Tr. 2264). There was no objection to this aspect of the charge, nor did defense counsel suggest an alternative instruction. Were this fact not sufficient to defeat his contention on appeal, the propriety of the instruction given would serve that purpose. Where the import of the entire charge was to the effect that psychiatric definitions are not always identical to judicial definitions, the absence of the specific language contained in *McDonald* on that point did not render the instruction defective. *Cf., Campbell* v. *United States, supra.*

3. The court adequately informed the jury of the relationship which must exist between disease or defect and the offense committed to relieve the accused of responsibility.

When the disease aspect of the *Durham* test was judicially undefined, the "product" concept was far more complex and difficult of lay understanding than it is now. When "disease or defect" meant any mental illness, *Carter* v. *United States, supra,* it was necessary to consider the severity of the disease

in determining its relation to the offense charged. With "disease or defect" defined as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls," *McDonald* v. *United States, supra,* the question of the severity of the illness is transposed from the "product" aspect of the test to the more discernible issue of disease. To determine the connection between a particular act and an abnormal mental condition, the question is whether the affect and impairment operated with respect to the act committed. *Cf., United States* v. *Currens,* 290 F. 2d 751 (3d Cir. 1961). This concept is adequately conveyed by the terms "product or result" (Tr. 2262), in this case where there was no testimonial ambiguity regarding the relationship between the abnormal mental condition, if it existed, and the act charged.

The absence of a more elaborate discussion of the necessary connection between disease and act, in the circumstances of this case, does not constitute reversible error. As defense counsel pointed out, "There is no issue of productivity here." (Tr. 2160). The Government's sole effort throughout the trial was directed toward establishing beyond a reasonable doubt that the defendant was not suffering from a mental disease or defect—that he was a malingerer. In almost three weeks of trial on the issue of insanity, it was never contended that the crime was not the product of a disease or defect, if one existed; rather, it was constantly urged that appellant was not afflicted by any mental disease or defect. As this Court suggested in *Carter* v. *United States, supra,* the Government may take issue with either or both elements of the insanity defense. Here, it chose to take issue solely with the question of whether the defendant was suffering from a disease or defect. If the jury had not been satisfied by the Government's proof on this question, it would have been left with no justification for rejecting the insanity defense.

Where there is "latent ambiguity" in the record regarding the factors which caused the defendant to commit the crime charged, failure to elaborate upon the meaning of product, upon request, may constitute error. *Wright* v. *United States,* 102 U.S. App. D.C. 36, 250 F. 2d 4 (1957) Where such ambigu-

ity does not exist, an inadequate definition of the product requirement does not, by itself, constitute prejudicial error. *Carter* v. *United States, supra*. *Bradley* v. *United States*, 102 U.S. App. D.C. 17, 249 F. 2d 922 (1957). Here, there was no ambiguity which rendered definition of the term mandatory. The issue was whether the appellant was mentally ill or whether he was merely malingering. In this situation, the failure to define product is more helpful than harmful to appellant.

> If the standard is expressed in abstract or ambiguous terms the burden becomes correspondingly more onerous then when expressed more concretely. To prove a negative proposition beyond a reasonable doubt is in itself a very heavy burden. But that heavy burden is vastly compounded when the Government must prove the negative case in terms like "product of disease," which are so vague and ambiguous that once a disease is shown to exist it is extraordinarily difficult for any psychiatrist to say or for the Government to establish *beyond a reasonble doubt* that the act and the disease are unrelated. *Frigillana* v. *United States*,——U.S. App. D.C., ——, 307 F. 2d 665, 667–68 (1962).

Only the purest speculation leads to the conclusion that the jury here might have had a reasonable doubt that appellant was suffering from a mental disease or defect, but that it convicted because it was convinced beyond a reasonable doubt that the crime was not the product of such disease or defect. To reverse on the basis of the court's failure to define product more elaborately requires a further extension of the imagination, for it requires the assumption that the jury concluded that product meant "exclusive cause" and that it found the disease or defect to be merely a contributing factor resulting in the commission of the offense. Only by hypothesizing such complicated mental gymnastics on the part of twelve reasonable jurors is it possible to reach the conclusion that appellant was harmed by the trial court's definition of product. It must be further assumed that the twelve jurors who sat in this case were

so unanimously devoid of any sense of humanity that they would not even recommend life imprisonment for a man whom they thought might be insane, though they had the power to do so.

This is not a case where the court improperly limited the jury's consideration to capacity to control behavior and ability to distinguish right from wrong as the trial judge did in *Campbell* v. *United States*, 113 U.S. App. D.C. 260, 307 F. 2d 597 (1962). It is not a case where eleven experts attested to the fact that the defendant was suffering from a serious mental disorder, where the Government offered only two lay witnesses in rebuttal, and where one of the major thrusts of the Government's opposition was that there was no causal connection between the defendant's disorder and the offense he committed, as occurred in *Wright* v. *United States, supra.* Nor is this a case where causal connection between the offense and the disease was made the primary issue, as in *Dukes* v. *United States*, 107 U.S. App. D.C. 382, 278 F. 2d 262 (1960). While it may be error for a trial court to define an important term improperly, it is not always error to offer no definition of a particular term. *Maynard* v. *United States*, 94 U.S. App. D.C. 347, 215 F. 2d 336 (1954). "Whether elucidation is necessary and, if so, whether failure to give it is prejudicial error depend upon the evidence which the jury has heard." *Wright* v. *United States, supra*, 102 U.S. App. D.C. at 43. In the instant case, the jury heard evidence from defense witnesses that appellant was suffering from a mental disease and a mental defect and that his act was a product of his disorder. It heard evidence from Government witnesses that the accused was without mental disease or defect. The issue was plain—it involved only the disease aspect of the test, not the product requirement. The court's definition of product was not in any way prejudicial to the accused. "Indeed, under all the circumstances, it seems probable that a more explicit and complete instruction * * * would have harmed rather than helped accused's case." *Gray* v. *United States*, 104 U.S. App. D.C. 153, 154, 260 F. 2d 483, 484 (1958).

V. The trial court's summary of the evidence on the issue of insanity was accurate, impartial, well within the limits of permissible judicial comment, and properly qualified by repeated admonitions that the jury was the sole judge of the facts.

In the course of its charge, the court briefly summarized the evidence on the issue of insanity. (Tr. 2265–2271). Before and after this summary, the court said at least five times that the determination of the facts was exclusively for the jury. (Tr. 2246–47, 2250, 2264–65, 2271). The jury's duty was not expressed casually. It was repeatedly emphasized so that no juror who was listening could have had any doubt regarding the nature of his responsibility. See *United States* v. *Kravitz*, 281 F. 2d 581 (3d Cir. 1960), *cert. denied*, 364 U.S. 941 (1961). Even if the court had unintentionally misstated some evidence, these instructions would protect against the harmful effect of such an error. *Heinecke* v. *United States*, 111 U.S. App. D.C. 98, 294 F. 2d 727, *cert. denied*, 368 U.S. 901 (1961).

Appellant's characterization of the summary as "devastating to Appellant" may be appropriate. (Br. 33). If so, the summary assumed that quality because of the nature of the evidence, not because of the nature of the summary. The argument that the summary was misleading because certain facts were omitted ignores the absolute impossibility of including, in a six page summary, all of the evidence presented in a four week trial. That more words were devoted to discussion of the Government's evidence than to that of the defense is a fact of no real significance. *United States* v. *Laurelli*, 293 F. 2d 830, 832 (3d Cir. 1961), *cert. denied*, 368 U.S. 961 (1962). The difference in length was due largely to the fact that the circumstances of the examinations conducted by the defense psychiatrists were not described. For that omission, appellant should be deeply grateful.[27] The brevity of the court's discussion of lay testimony presented by the defense was fully justified by the fact that most of that testimony had been repeated three times in detailed hypothetical questions. (Tr. 916–

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The trial judge gave a fair and accurate statement of the evidence in an impartial, dispassionate, and judicial manner. By clear and specific language, he informed the jurors that they should exercise their independent and untrammeled judgment in determining the facts. This complies with the rule long applied by this Court. See, *e.g.*, *Kinard* v. *United States*, 69 U.S. App. D.C. 322, 101 F. 2d 246 (1938). The court has no duty to become an advocate for the accused Error cannot be predicated upon its failure to perform that role.

VI. The trial court instructed the jury properly on the question of punishment.

A. The court informed the jury that the question of punishment must be decided by unanimous vote.

The trial court instructed the jury that there were three possible verdicts available upon a finding of guilt: "Guilty as charged; or guilty as charged, with a recommendation of life imprisonment; or guilty as charged, with information that the jury is unable to agree unanimously as to punishment." (Tr. 2272). While the jury was not expressly informed that a verdict of "guilty as charged" required unanimity, the instruction given plainly conveyed that requirement. Had any one of the jurors been unwilling to agree to the verdict, compliance with the court's instruction demanded that the jury report that "it is not unanimous on the question of punishment." The instruction on this point was virtually identical to the language of the statute involved. 22 D.C. Code § 2404 (Supp. II, 1963). Despite the fact that the statute does not expressly state that a verdict without recommendation must be reached by unanimous vote, the meaning of the statute and the meaning of an instruction expressed in the statutory terms are unambiguous. *Cf.*, *Gray* v. *United States*, 104 U.S. App. D.C. 153, 260 F. 2d 483 (1958). The jury was adequately informed that its decision as to punishment, whether it be for life or death, re-

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quired unanimous agreement, and that if unanimity could not be reached, disagreement must be reported.[28]

B. The jury was properly left uninformed as to the possible consequence of its failure to agree unanimously on the question of punishment.

Appellant raises another objection to the instruction on sentencing which the trial court was given no opportunity to consider—either by way of submission of an alternative instruction or by virtue of an objection to the instruction given. This complaint relates to the fact that the trial court did not inform the jury that the court might impose a life sentence if the jury reported that it was unable to agree on the question of punishment. No reason is suggested to this Court for disregarding the plain meaning of Rule 30 and ignoring its application to this case. Rule 30, Fed. R. Crim. P. Appellant apparently assumes that Rule 30 has no application in capital cases. His assumption has frequently been held invalid. *E.g.*, *Wheeler* v. *United States*, 82 U.S. App. D.C. 363, 165 F. 2d 225 (1947), *cert. denied*, 333 U.S. 329 (1948). In the peculiar circumstances of this case, strict enforcement of Rule 30 is fully warranted. Absent any request or objection in the trial court, any alleged defect in instructions not affecting substantial rights should not be considered on appeal. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F. 2d 261 (1950); Rule 52(b), Fed. R. Crim. P.

Assuming that the issue had been properly preserved, it provides no basis for reversal. The argument is based upon two faulty assumptions: 1) that the jury should be informed of the consequence of a failure to reach agreement on the ques-

[28] Appellant relies upon *Andres* v. *United States*, 333 U.S. 740 (1948). The *Andres* case involved a statute which contained no provision allowing the jury to report disagreement. Pursuant to the instruction given in *Andres*, the jury might well have concluded that it must return an unqualified verdict unless all twelve jurors agreed to a recommendation of life imprisonment. Since an unqualified verdict might have been returned if only one juror opposed the recommendation, the instruction was held improper. In the present case, the court's instruction required unanimity on the question of punishment. Insistence of a single juror upon the recommendation of life would have required the jury to report disagreement as to punishment. Since jurors are presumed to follow instructions, the absence of such a report conclusively establishes that all jurors agreed to the unqualified verdict.

tion of punishment, and 2) that failure to provide this information is apt to cause a juror to violate his sworn oath rather than "give up the comforting cloak of unanimity." The first assumption ignores the general principle that a jury is not to be informed of the sentence which may be imposed upon a finding of guilty. *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 25, 254 F. 2d 725, 729 (1957), *cert. denied*, 356 U.S. 961 (1958). Although the jury had the responsibility of determining sentence in this case, it had no concern with the sentence which might be imposed if it reported disagreement on the question of punishment. To inform the jury of the court's discretion in sentencing would tend to remove from the jury the primary responsibility for determining punishment. Just as its verdict on guilt should not be influenced by the sentence which might be imposed, its decision on punishment should be uninfluenced by the consequences of a failure to agree. See *Lovely* v. *United States*, 169 F. 2d 386 (4th Cir. 1948). The court had no duty to inform the jury that it might impose a life sentence if the jury reported disagreement. *Cf.*, *Cirej* v. *State*, 24 Wyo. 507, 161 Pac. 556 (1916).

The second assumption is equally untenable. In the absence of strong evidence to the contrary, it must be presumed that every juror abided by his oath, followed the court's instructions, and voted his convictions. This presumption cannot be discarded upon the theory that the jurors did not appreciate the importance of their decision. Nor can it be rejected upon the assumption that a juror would be unwilling to assert his position if by so doing he compelled disagreement. When the jurors were polled they unanimously indicated their agreement to the verdict of guilty as charged. The record provides no basis for discrediting that verdict.

C. No restrictions were imposed upon the jury's right to recommend life imprisonment.

Appellant contends that the trial court erred in failing to instruct the jury regarding its discretion as to punishment. No such instruction was requested. No objection was raised to the instruction given. Appellant is no position to urge this point on appeal. Rule 30, Fed. R. Crim P. Nevertheless, the

instruction given was entirely proper. Under statutes which empower the jury to determine punishment, the judge must instruct the jury that it may determine which of the prescribed punishments is to be imposed. *Smith* v. *State*, 205 Ark. 1075, 172 S.W. 2d 248 (1943); *Bradshaw* v. *Commonwealth*, 174 Va. 391, 4 S.E. 2d 752 (1939). The court here gave such an instruction. (Tr. 2253–54, 2272.) No suggestion was made regarding the factors which might be considered in determining the punishment to be imposed. Refusal to make such suggestions is entirely proper. *Ochoa* v. *United States*, 167 F. 2d 341, 345 (9th Cir. 1948). In *Winston* v. *United States*, 172 U.S. 303 (1899), the Supreme Court held improper an instruction which appeared to limit the jury's power to qualify its verdict to "cases that have palliating circumstances which would seem to justify and require it." *Id.* at 305. The defendant in *Winston* had requested that the jury be instructed that it might qualify its verdict "no matter what the evidence may be." 172 U.S. at 307. In reversing, the Supreme Court clearly stated its objection to the charge that was given:

> The Act does not itself prescribe nor authorize the court to prescribe any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and consciences of the jury. 172 U.S. at 313.

Fully complying with that mandate, the trial court in the instant case said nothing to limit the jury's authority to recommend life imprisonment.

Nor did the court commit the error which required reversal in *Austin* v. *United States*, 208 F. 2d 420 (5th Cir. 1953), where the judge, instructing upon the defense of voluntary intoxication, commented that "the law does not permit [the defendant] to use his own vice as a shelter against the normal legal consequences of his conduct." Because that instruction, unqualified by the instruction on punishment, might have given the jury the impression that it could not consider evidence of intoxication in determining whether capital punishment should be imposed, reversal was required. No similar defect exists in the present case. Nothing in the court's charge suggested that

emotional disturbance or mental deficiency could not be considered in determining punishment. The trial court made no effort to define or limit in any way the jury's exercise of the right to qualify its verdict.[29] The question of punishment was properly committed to the jury's sole discretion. See *Ochoa* v. *United States, supra.*

VII. The prosecutor's exercise of peremptory challenges did not deprive appellant of a fair trial.

The right to challenge prospective jurors without cause, where granted by law, has been traditionally construed as an absolute right—one which can be exercised by all litigants without any assigned or stated cause. *E.g., Hall* v. *United States,* 83 U.S. App. D.C. 166, 168 F. 2d 161, *cert. denied,* 334 U.S. 853 (1948). Neither opposing counsel nor the court can question the manner in which peremptory challenges are asserted. 31 AM. JUR., *Jury* § 233 (1958). Appellant now contends that this well established principle must be qualified to prevent a prosecutor from challenging Negroes when a Negro is being tried. Appellant's contention was rejected by this Court in *Hall* v. *United States, supra,* where "appellant's argument of unconstitutional peremptory challenging" was found to be "wholly untenable." 83 U.S. App. D.C. at 169, 168 F. 2d at 164.

Compelling reasons exist for reaffirming the view expressed in *Hall.* Courts which have dealt with the issue have uniformly adhered to the traditional concept of a peremptory challenge in precluding inquiry into the motives or mental attitudes of a prosecutor exercising the right. *E.g., United*

[29] It is interesting to note that the Government did not ask for the death penalty in this case. After advising the jury that it was the jury's duty to determine punishment, the prosecutor expressly stated that he was asking for no specific verdict. (Tr. 2205).

Defense counsel commented upon the jury's right to recommend life imprisonment only once. He stated:

"The Government has suggested that it is not asking for any penalty. It could have, and it usually does. Perhaps its ommission to do so leaves it free for you, without too much trouble, to join in the unanimous recommendation of life imprisonment instead of death." (Tr. 2224).

Defense counsel never argued that the accused should not be sentenced to death if convicted.

States ex rel Sain, 297 F. 2d 799 (7th Cir. 1962); *People* v. *Harris*, 17 Ill. 2d 446, 161 N.E. 2d 809 (1959), *cert. denied*, 362 U.S. 928 (1960); *Com. ex rel Ashmon* v. *Banmiller*, 391 Pa. 141, 137 A. 2d 236, *cert. denied*, 356 U.S. 945 (1958). Such uniform rejection of appellant's position provides persuasive evidence that the prosecutor's conduct in this case complied with the applicable standard of acceptable behavior—the standard which defines the concept of due process. See cases cited, Annot., 4 A.L.R. 2d 1200 (1949).

Carried to its logical conclusion, acceptance of appellant's view would effectively deprive the Government of its right to peremptory challenges. Not only Negroes could be heard to complain of discrimination, but those of any particular political or economic group, religious faith, ancestry, or sex would necessarily be afforded the same right. All of these groups are protected from arbitrary exclusion in the selection of veniremen. *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946). The same rationale which would permit a Negro to attack peremptory challenges directed to members of his race, would permit the same attack upon challenges to members of any particular class. The prosecutor would either have to assign a reason for his challenge or take the risk of a new trial being granted.

The problem of applying such a rule is amply demonstrated by the instant case. The record demonstrates that the prosecutor did not direct all of his challenges to Negroes. (Tr. 128–29, 54–65). It does not demonstrate whether all members of the jury were white.[30] Appellant's mere assertion of arbitrary exclusion of members of his race, unsupported by proof in the record, is not sufficient to sustain his contention. *Cf.*, *Patton* v. *Mississippi*, 332 U.S. 463 (1947); cases cited, Annot., 1 A.L.R. 2d (1948). Nor is it sufficient to compel the Government to assign reasons for its challenges. *Hall* v. *United States*, *supra*. The assertion provides no basis for concluding that appellant was denied a fair trial.

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[30] The prosecutor announced satisfied four times during the course of selecting a jury. (Tr. 56, 58, 59.) He suggested that, on at least two of those occasions, there were Negroes on the jury. (Tr. 128). His statement is not controverted.

VIII. Where the defendant does not request that prospective jurors be asked whether they are biased in favor of capital punishment, the trial court's failure to make that inquiry provides no basis for reversal.

The *voir dire* examination of prospective jurors was conducted by the trial court. (Tr. 12–53). After propounding several questions, the court asked both parties whether further inquiry was desired. (Tr. 23). Defense counsel requested that prospective jurors be asked whether they had "ever expressed any views on the subject of capital punishment." (J.A. 6). His request was granted. (Tr. 35). Only one other question suggested by defense counsel even vaguely referred to possible bias in favor of capital punishment, and that question also dealt with expression of views. (J.A. 6). Consequently, prospective jurors were never asked whether they were biased against a recommendation of life imprisonment, *nor was the trial court requested to make that inquiry.*

Appellant's proposed question was stated as follows: "Have you ever expressed disappointment or disapproval when a person convicted of a very atrocious crime has escaped the death penalty?" (J.A. 6). In this form, the question was not pertinent to the issue of whether a prospective juror would have such prejudice against the substitution of life imprisonment as to render him incapable of rendering a fair verdict. It cannot be said that the trial court abused its discretion in rejecting this question. *Cf., Rivers* v. *United States,* 270 F. 2d 435 (9th Cir. 1959), *cert. denied,* 362 U.S. 920 (1960). The trial court had given no indication that it would not permit questions regarding bias in favor of capital punishment, and appellant cannot excuse his failure to make a proper request on that ground. *Compare, Aldridge* v. *United States,* 283 U.S. 308 (1931).

Appellant's assertion of error on this point raises a novel question. Had defense counsel conducted the *voir dire* examination, his proposed questions clearly indicate that he would not have inquired into the matter of bias against life imprisonment. (J.A. 6, 7). In that case, failure to inquire would certainly provide no basis for reversal. *United States* v. *Nirenberg,* 242 F. 2d 632 (2d Cir.), *cert. denied,* 354 U.S. 941 (1957). Despite the fact that the court was dealing with a recently

enacted sentencing statute, 22 D.C. Code § 2404 (Supp. II, 1963), defense counsel did nothing to suggest to the court a cause for disqualification of jurors which did not exist under the prior mandatory death statute. 22 D.C. Code § 2404 (1961). Appellant now urges that he is entitled to a new trial, notwithstanding counsel's failure in this respect; his contention must rest upon the mere fortuity that the questions were propounded by the trial court rather than by counsel.

No duty rests upon a trial judge to examine, upon his own motion, into the qualifications of jurors. *United States* v. *Nirenberg, supra.* Appellee has been unable to find a single case in any jurisdiction in which a conviction was reversed because the trial judge failed to make an unrequested inquiry upon *voir dire. Cf.,* cases cited, Annots., 48 A.L.R. 2d 560 (1956); 54 A.L.R. 2d 1210 (1957). To the contrary, it is well settled that a specific request is an absolute prerequisite to the assertion of error on the ground of failure to conduct a proper *voir dire* examination. *E.g., Cwach* v. *United States,* 212 F. 2d 520 (8th Cir. 1954); *Ferrari* v. *United States,* 244 F. 2d 132 (9th Cir.), *cert. denied,* 355 U.S. 873 (1957). Absent such a request, waiver of the right to inquire is conclusively presumed. *United States* v. *Nirenberg, supra.* The Government does not contend that bias for or against capital punishment is not a proper area of inquiry. It urges, however, that failure to request such inquiry is dispositive of any contention based upon its absence.

Acceptance of appellant's position on this matter would result in grave consequences to the judicial system. It would render any case subject to attack where the trial judge failed to explore every possible area of juror disqualification. In the instant case, for example, prejudice against appellant's race or attitudes toward the testimony of police officers would have been proper subjects of inquiry. *Aldridge* v. *United States,* 283 U.S. 308 (1931); *Sellers* v. *United States,* 106 U.S. App. D.C. 209, 271 F. 2d 475 (1959). By appellant's theory, failure to examine as to those matters provides a basis for reversal, even where no such examination was requested. The result would be absurd and unconscionable. It would permit the accused to create error by his own misfeasance. It would ignore the prin-

ciple than any disqualification is subject to waiver. It would impose upon the trial judge the intolerable burden of examining into every conceivable area of disqualification without the guidance of attorneys who are familiar with the issues in their case. To avoid such consequences, a clear indication of the examination desired must be maintained as a strict prerequisite for appellate review. Failure to meet that prerequisite defeats appellant's assertion of error.

IX. The prosecutor properly attacked the testimony of a defense witness by mentioning contradictory evidence, remained remarkably faithful to the record throughout his argument, and fairly commented upon the physical appearance and demeanor of the accused as proof of the inaccuracy of expert opinions based upon current observations of his physical appearance and demeanor.

A. Where the accused introduces evidence of his repeated misconduct as proof of insanity, the prosecutor's comment upon such "infractions" is entirely proper.

In the course of closing argument, government counsel challenged the truth of Annie Stewart's testimony—particularly the sincerity of her opinion that her husband, appellant, was of unsound mind in 1953. As an indication of the witness' lack of sincerity, the prosecutor noted that she had never suggested to the police that her husband was sick when "the police came up there for different infractions." (Tr. 2189.) The prosecutor suggested that there had been opportunities to secure treatment for appellant, and that the witness was familiar with the manner in which this could be done (Tr. 2189). Defense counsel made no objection to these comments.

Appellant now contends that, by making these remarks, the prosecutor "testified by innuendo that appellant had been in constant trouble with the police." (Br. 57.) Two factors render this proposition utterly frivolous. 1) The prosecutor was not testifying, but was merely arguing the evidence. A defense witness stated that he had called the police to Stewart's home "as much as two or three times." (Tr. 635.) Stewart's wife mentioned another time the police had been there. (Tr. 727). Fair comment upon this evidence is entirely proper. See *Berger* v. *United States*, 295 U.S. 78, 88 (1935). 2) Ap-

pellant should not be heard to claim prejudice on the ground that the Government suggested that he had committed "different fractions," in a case where the defense consumed several days of trial offering the testimony of twelve witnesses to prove the commission of such "infractions" as evidence of insanity (Tr. 412–886). Certainly appellant was not prejudiced by the prosecutor's qualified acknowledgment of the truth of certain defense evidence.

B. The prosecutor's casual reference to a document not in evidence does not warrant reversal where the document was unimportant, the comment inoffensive, and the defense asserted no objection.

In closing argument, Government counsel suggested that the written statement of a Government witness had been consistent with the witness' testimony and had contained everything the witness stated at trial (Tr. 2229–30). While the written statement was apparently consistent, it did not contain a certain matter mentioned at trial (Tr. 376). The statement was identified (Tr. 377), but not introduced into evidence. No objection was made to the prosecutor's remark. That fact alone controls the disposition of appellant's demand for reversal. It is only in the most exceptional cases that defense counsel can "remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940). The circumstances of this case do not warrant abandonment by this Court of the requirement that an objection be interposed. The remark was apparently unintentional, substantially accurate, and utterly insignificant in the context of the entire trial.

If objection had been made, the comment would provide no basis for reversal. The trial of this case consumed almost four weeks. The transcript of the proceedings is almost 2300 pages in length. To demand unerring accuracy in counsel's argument in a trial this length is to demand the impossible. Such perfection is not required. *McFarland* v. *United States*, 80 U.S. App. D.C. 196, 150 F. 2d 593, *cert. denied*, 326 U.S. 788 (1945). That appellant could discover only one comment upon evidence outside the record attests to the remarkable de-

gree of accuracy achieved by the prosecutor. Comparatively few verdicts would stand if every comment outside the evidence required reversal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 243 (1940). "The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial." *Isaacs* v. *United States*, 301 F. 2d 706, 736 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962). Examined in light of that standard, the challenged remark falls far short of qualifying for the drastic remedy of a new trial.

C. Where four psychiatrists considered the physical appearance and demeanor of the accused at the time of trial in reaching their diagnoses, the prosecutor had the right to comment upon the accuracy of their observations by directing the jury's attention to the appearance and demeanor of the accused in court.

Four defense experts examined appellant for the first time in 1962—more than nine years after the offense occurred. Dr. Sprehn's examination was performed five days after the trial began, and Dr. Legault conducted his examination the day before the commencement of the trial. (Tr. 1110, 1258). Sprehn found appellant "detached, disinterested," "withdrawn and isolated," with "shallow emotional responses." (Tr. 1111). With Legault, appellant's "mood throughout the examination was rather flat." (Tr. 1265). Dr. Kastner examined appellant on June 9, 1962. (Tr. 1606). Kastner observed that appellant "demonstrated no psychomotor activity," that he appeared withdrawn, that his "facial expression remains unchanged," and that "he sat there almost as limp." (Tr. 1608, 1615, 1619, 1620). In an examination conducted on May 26, 1962, Dr. Salzman found appellant "dull, listless, apathethic and confused." (Tr. 1684, 1690). Each of these experts based their opinions, in part, upon the observations mentioned.

With these facts in evidence, the prosecutor made the following argument:

> There is one real important factor in this case that has not been discussed. You weigh, ladies and gentlemen, everything that the defense psychiatrists have told you about the illness this defendant has, and its severity and its degree and stack it up against the defendant's demeanor all four weeks he has been here. (Tr. 2204).

The court, *sua sponte,* interrupted this argument before any objection was made by defense counsel. The prosecutor was instructed not to make the argument "because a malingerer might meet your challenge." (Tr. 2205). Although defense counsel indicated that he considered the remark "highly improper," he made no request that the jury be instructed to disregard the remark. Appellant now claims that the remark was improper because it violated his privilege against self-incrimination, and because it put his sanity at the time of trial in issue. (Br. 53–56).

Calling the jury's attention to the accused's physical appearance does not violate his privilege against self incrimination. *Roberson* v. *United States,* 282 F. 2d 648 (6th Cir.), *cert. denied,* 364 U.S. 648 (1960); *Swingle* v. *United States,* 151 F. 2d 512 (10th Cir. 1945). This Court has recognized that a jury has the right to examine the physical appearance of a defendant to determine the credibility of a witness who testifies with regard to that matter. *Roberts* v. *United States,* 109 U.S. App. D.C. 75, 284 F. 2d 209 (1960). In *Taylor* v. *United States,* 95 U.S. App. D.C. 373, 222 F. 2d 398 (1955), the trial judge suggested that the jury might consider the accused's appearance in determining whether he was sane While the constitutional question was not decided in that case, all of the cases cited in the decision support the view that the instruction did not violate the defendant's testimonial privilege. See *Holt* v. *United States,* 218 U.S. 245 (1910); 8 WIGMORE, EVIDENCE § 2265 (McNaughten Ed. 1961). In the instant case, the jury was entitled to test the accuracy of the experts' observations in determining the validity of their diagnoses based thereon. For that purpose, the appearance and demeanor of the accused could be considered.

Appellant cannot claim that his demeanor at the time of trial was not in issue where it was a fact relied upon by four of the experts he presented. See *Lyles* v. *United States,* 103 U.S. App. D.C. 22, 27, 254 F. 2d 725, 730 (1957), *cert. denied,* 356 U.S. 961 (1958). Defense experts considered and commented upon appellant's condition at the time of trial and employed their knowledge regarding his current condition in reaching their opinions regarding his mental condition on March 12,

1953. In these circumstances, the Government had every right to discredit their opinions by attacking the validity of the information upon which they were based.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ALFRED HANTMAN,
GERALD A. MESSERMAN,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1953

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,486

WILLIE LEE STEWART,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

INDEX

JOINT APPENDIX

[Filed in open Court Apr. 13, 1953]

EXCERPTS FROM INDICTMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled March 2, 1953; Sworn in March 3, 1953.

THE UNITED STATES OF AMERICA	Criminal No. 633-53
v.	Grand Jury Nos. 477-53, 437-53
WILLIE LEE STEWART, ANNIE LEE STEWART, WILLIS DANIELS	First Degree Murder, 22 D.C. Code 2401
Defendants.	Robbery, 22 D.C. Code 2901 Accessory after the Fact, 22 D.C. Code 106

The Grand Jury charges:

On or about March 12, 1953, within the District of Columbia, Willie Lee Stewart did perpetrate a robbery by force and violence and against resistance, and by sudden and stealthy seizure and snatching and by putting in fear, and did steal, take and carry away, off the person and from the immediate actual possession of Harry Honikman, $416.07 in money, the property of Harry Honikman; and while perpetrating the robbery in the manner aforesaid, unlawfully and feloniously did kill and murder the said Harry Honikman by means of shooting him with a pistol, of which shooting Harry Honikman, on March 12, 1953, did die.

* * * * *

[Filed April 21, 1953]

PLEA OF DEFENDANT

On this 17th day of April, 1953, the defendants: Willie Lee Stewart, Annie Lee Stewart, and Willis Daniels, appearing in proper person and by their attorney Foster Wood, Esquire, being arraigned in open Court upon the indictment, the INDICTMENT being READ to them, pleads Not Guilty thereto.

#1. The defendant is remanded to the District of Columbia Jail.

EACH: The defendant is granted ten (10) days in which to file such motions as he may be advised.

By direction of

Henry A. Schweinhaut
Presiding Judge
Criminal Court # One

* * *

* * *

[Filed Oct. 12, 1962]

MOTION FOR DISMISSAL FOR LACK OF SPEEDY TRIAL
(#1 - Willie Lee Stewart)

The defendant moves under Section 12(b)(1) for dismissal on the ground that he has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

This motion is based on the following factual statement which the defendant calls upon the Government to admit or deny, and on legal argument contained in the attached Memorandum of Points and Authorities.

Factual Statement. The trial now scheduled for October 22, 1962, will be the fifth trial and will begin nine years and seven months after the commission of the crime. Less than one year of this time is attributable to postponements on the defendant's motions.

The defendant was indicted on April 13, 1953, in a two-count indictment charging the crime of first degree murder in the perpetration of a robbery and the crime of robbery, arising out of an incident which occurred on March 12, 1953. Defendant was brought to trial on June 16, 1953, which trial was terminated in a finding of guilty as indicted on June 26, 1953. This judgment was reversed by the United States Court of Appeals for the District of Columbia on September 8, 1954. Stewart v. United States, 94 U.S. App. D.C. 293, 214 F.2d. 879 (1954). Defendant was again brought to trial on January 10, 1955, which trial was terminated in a verdict of guilty as charged on January 13, 1955. This judgment was reversed by the United States Court of Appeals on May 18, 1955, remanding the case to the United States District Court for correction of the sentence imposed. On August 1, 1955, the sentence of February 11, 1955, was vacated and on October 7, 1955, defendant was resentenced to death by electrocution. This judgment was reversed on August 18, 1957, by the United States Court of Appeals. Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d. 42 (1957). On October 24, 1957, the defendant was committed to Saint Elizabeths Hospital for a determination of his competency to stand trial. This order was entered on a motion filed by counsel for the defendant. On February 18, 1958, an order was entered by this court extending the commitment of the defendant at Saint Elizabeths Hospital for an additional sixty day period. This was at the request of the hospital. On motion of counsel for the defendant an order was entered on July 1, 1958, remanding the defendant to the D. C. General Hospital for further mental examination to determine his competency to stand trial. On September 30, 1958, an oral motion for a continuance of the trial date was granted, and on October 28, 1958, a hearing was commenced to determine the defendant's competency to stand trial. This hearing was concluded on October 29, 1958, with a finding by the court that the defendant was then competent to stand trial. On motion of counsel for the defendant the trial date was continued to November 12, 1958. On November 12, 1958, the trial was continued until November 14, 1958, due to a previous commitment of the court. The third trial commenced on November 14, 1958, and was terminated on November

25, 1958, by a verdict of guilty as charged. This judgment was affirmed by the United States Court of Appeals on February 16, 1960. United States v. Stewart, 107 U.S. App. D.C. 159, 275 F.2d. 617. A writ of Certiorari was granted by the Supreme Court and on April 24, 1961, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case for a new trial. Stewart v. United States, 366 U.S. 1 (1961).

On September 19, 1961, an order was entered by this court granting defendant's motion for a mental examination to be performed in the District of Columbia Jail. This was modified so that the defendant was transferred to D. C. General Hospital until October 10, 1961. Two successive continuances on request of the defendant were granted on October 11, 1961, and November 28, 1961, and defendant was again tried on February 19, 1962. This trial resulted in the jury's being unable to agree on March 3, 1962. On April 19, 1962, an order was entered on motion of the defendant to commit defendant to Saint Elizabeths Hospital for a period not to exceed fifteen (15) days. On May 18, 1962, objection of the defendant to the report of the hospital was heard and denied. Trial date of June 19, 1962, on motion of the defendant, was continued to October 22, 1962, the present date of trial. Thus, nine years and seven months have elapsed since the alleged crime was committed and nine years and six months have elapsed since the defendant was originally indicted in this proceeding. The first judgment of conviction was reversed by the United States Court of Appeals for defects in the court's instruction to the jury on the issue of the defendant's insanity at the time the crime was committed. Stewart v. United States, 94 U.S. App. D.C. 293, 214 F.2d. 879 (1954). The second conviction was reversed by the United States Court of Appeals solely on the ground of improper argument of the prosecutor to the jury. Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d. 42 (1957). The third judgment of conviction was reversed by the Supreme Court of the United States solely on the ground of improper cross-examination of the defendant by the prosecutor. Stewart v. United States, 366 U.S. 1 (1961). The fourth trial ended with the jury unable to agree. Of the nine years and

six months delay between the date of indictment and the present trial only three periods of delay are chargeable to the defense: (1) from October 14, 1957, when a motion was filed requesting a determination of the defendant's mental competency to stand trial, through the period November 12, 1958, when the third trial was commenced; (2) from September 19, 1961, when defendant was ordered to D. C. General Hospital to February 19, 1962, when the fourth trial was commenced; and (3) from April 19, 1962, to the present trial date. These delays were in the main prompted by requests for mental examinations of the defendant in accordance not only with statutory provisions, but also the numerous decisions on the part of the United States Court of Appeals. Less than eleven months of the total time can be attributed to continuances sought by the defendant.

Respectfully submitted,

/s/ CHARLES B. MURRAY,
Attorney for Defendant

[Filed Oct. 19, 1962]

[DENIAL OF MOTION FOR DISMISSAL FOR LACK OF SPEEDY TRIAL]
(#1 - Willie Lee Stewart)

On this 19th day of October, 1962, came the attorney of the United States, the defendant in proper person and by his attorney, Charles B. Murray, Esquire; whereupon the motions of the defendant to dismiss for lack of a speedy trial and to suppress, coming on to be heard, is argued, and DENIED by the Court.

The defendant is remanded to the District of Columbia Jail.

By direction of

Alexander Holtzoff
Presiding Judge
Criminal Court # Two

* * * * * *

[Filed Oct. 22, 1962]

QUESTIONS PROPOSED BY DEFENDANT
TO PROSPECTIVE JURORS
(#1 - Willie Lee Stewart)

1. Have you ever studied law?

2. How many members of the prospective panel have lived in the District of Columbia area more than 20 years? More than 5 years?

3. The defense in this case is insanity. Are you suspicious of an insanity defense when it is raised in a murder trial?

4. Do you feel that the defense of insanity has been abused in this jurisdiction in recent years?

5. Have you ever expressed any views on the subject of capital punishment?

6. Do you belong to any organization which has adopted a resolution or taken any action or position in regard to the crime situation in the District of Columbia?

7. Have you ever expressed disappointment or disapproval when a person convicted of a very atrocious crime has escaped the death penalty?

8. Do you have conscientious scruples against the infliction of the death penalty?

9. Is your disapproval of capital punishment so strong that you could not join in a verdict carrying the death penalty regardless of how aggravated or how brutal the murder was?

10. If the Court should instruct you that in this case, where the defense is insanity, the Government must prove the sanity of the defendant just as it must prove his guilt, that is, beyond a reasonable doubt, could you follow that instruction without any mental reservation whatsoever?

11. If the Court should instruct you that the defendant is presumed to be innocent, and that presumption stays in the case from the moment you are sworn as jurors until you become convinced in your deliberations in the jury room, if you ever do, of defendant's guilt beyond a reasonable doubt, could you follow that instruction without any mental reservation whatsoever?

12. Would you give more credence to a Government psychiatrist than a private one?

13. Have you ever been asked before as a prospective juror whether you have conscientious scruples against the infliction of the death penalty?

14. (To be asked jurors who have said they are conscientiously opposed to inflicting the death penalty.) If you were chosen as a juror in this case and the court should instruct you that the jurors should consider all the facts in the case and decide whether to recommend the death penalty or not recommend it, would you be able to consider the arguments and statements of your fellow jurors so that you might be persuaded that the death penalty was proper in this particular case?

15. (To the same jurors.) Is your feeling against the death penalty so strong that even if the court gave the jury the discretion to join in a unanimous verdict against the death penalty or not to recommend the death penalty, you could not under any circumstances join in a verdict or recommendation which would carry the death penalty?

16. Do you have a relative or very close friend who is a member of the Metropolitan Police Department of the District of Columbia, the Federal Bureau of Investigation, the Secret Service, the Post Office Department, the Narcotics Service, the Internal Revenue Service, or any other law enforcement or investigation agency?

17. Do you regard the testimony of lay persons in regard to a person's sanity as not worth much?

18. If relatives and close friends should testify in this trial about acts of abnormal conduct by defendant, could you give such testimony fair consideration and judge its weight and credibility as you would any other testimony?

19. The evidence in this case will show that the defendant shot and killed Mr. Honikman in the presence of his wife and daughter under circumstances of great brutality. Do you feel that the detailing of these facts by witnesses including the daughter of Mr. Honikman will inflame and prejudice your mind so that you will not be able to give fair consideration to the defendant's defense of insanity?

20. Have any of you been the unfortunate victim of a crime? What type of crime was it? When did it occur? Did you have to testify in court? Close friends or relatives?

21. Have you ever testified in court before? Was it a civil or criminal case? What type of crime was involved? Did you testify for the defense or the prosecution? When did all this take place?

22. Would any of you give a police officer's testimony any more or greater credit than you would give any other citizen's testimony?

23. There has been a great deal of publicity in the newspapers recently about a crime wave in the District of Columbia. Would any of you allow that publicity to influence you in your verdict in this case?

Now I would like to reverse things a little. If the answer to any of my questions is "yes" - I wish you would so signify by remaining seated. On the other hand, if the answer is "no" - would you please rise?

24. If you are deadlocked in the jury room, would you continue to vote for a verdict of not guilty as long as you have a reasonable doubt - even though 11 other jurors may be voting for guilty?

25. Would you render a verdict in this case according to the law and the evidence - and not allow the fear of criticism from any source to influence your verdict?

26. If you were so unfortunate as to be on trial here today instead of Mr. Stewart, would you be willing to be tried by 12 persons in the same frame of mind as you are in today?

(Would you be entirely satisfied to be tried by a jury in your present frame of mind if you were Mr. Stewart?)

[Filed Nov. 1, 1962]

[November 1, 1962.

At my direction the Clerk marked this filed as of this date. I am retaining this in my personal custody for the duration of the trial and withholding it from the public file until the end of the trial.

/s/ Holtzoff J]

STATEMENT OF DEFENSE COUNSEL
AT THE CONCLUSION OF THE
TESTIMONY OF DR. JOHN L. ENDACOTT
(#1 - Willie Lee Stewart)

In November, 1961, the United States Attorney and his assistant visited the office of Charles B. Murray, counsel for the defendant and suggested that counsel for the defendant move for a postponement of the trial until January, 1962. The purpose was to have the trial come up at a time after Congress should have adopted the Amendment then proposed (and now in effect) giving the jury discretion as to penalty in first degree murder cases. It was suggested that if when that adjourned date arrived Congress had not passed the Amendment the United States Attorney would seriously consider accepting a plea to second degree murder. Counsel for the defendant moved for and obtained the postponement into January, 1962, and again the case was postponed for a reason not now recalled to February 19, 1962, and came on for trial then. Before that trial started counsel for the defendant stated that if the Court on Government's motion would dismiss the first degree indictment against this defendant and an information were filed charging the defendant with murder in the second degree the defendant would make all necessary waivers and enter a plea of guilty to that information charging murder in the second degree. (Proceedings of February 19, 1962, Tr. 4.) The Assistant United States Attorney stated that he was unwilling to accept the proposal and the United States Attorney himself who was then in court came up to the bench and stated that his office had decided not to agree to the proposal. (Id. Tr. 5.) At that same time counsel for the defendant proposed to stipulate the facts of the murder saving only the defense of insanity. This stipulation of course was limited to the Government's case in chief and not to facts

concerning the murder which might be shown on the issue of insanity. (Id. Tr. 6-7.)

The prupose of the stipulation was to eliminate from the evidence inflamatory facts and testimony in regard to facts in regard to the brutal crime. (Id. Tr. 6-7.) Somewhat the same consideration led to the proposal made by the defense in this trial for a conference among the psychiatrists on both sides of this case for the purpose of eliminating unnecessary controversy and bitter adversary examinations. (Proceedings of October 24, 1962, Tr. 121-128.)

This court has ordered counsel for the defendant to produce now all its available witnesses on the insanity issue. This is an absolute and unqualified order of compulsion.

Counsel for the defendant now states to the court as follows:

That he will not produce any additional witnesses on the insanity issue unless compelled by the Court to do so under pain of contempt.

That if a witness is produced and sworn, counsel for the defense will not question that witness unless ordered by the court to do so under pain of contempt.

These statements apply to all available witnesses for the defense on the insanity issue. They are as follows:

Dr. John L. Endacott, who has already testified under compulsion.

Dr. George W. Sprehn, who is believed to be available at this time.

Dr. Oscar Legault, who is expected to be available.

Dr. Ernest Y. Williams, who is expected to be available.

Dr. Richard A. Kastner, who is expected to be available Monday, November 5, 1962.

Dr. Leon Salzman, who has examined the defendant but who is not believed to be available.

[Filed Nov. 15, 1962]

Defendant's Instruction No. 2
(#1 - Willie Lee Stewart)

You are instructed that if the defendant had a mental disease or defect and the acts charged in the indictment were the product of that mental disease or defect, he would be not guilty by reason of insanity even though such mental disease or defect did not substantially affect the defendant's mental or emotional processes and did not substantially impair the defendant's ability to control his behavior.

[Denied]

[Filed Nov. 15, 1962]

Defendant's Instruction No. 4
(#1 - Willie Lee Stewart)

If you find that the defendant is guilty of the crime charged, you shall then consider whether the punishment should be death or life imprisonment.

If you agree by unanimous vote that the punishment should be death, your verdict shall be "Guilty as Charged."

If you agree by unanimous vote that the punishment should be life imprisonment your verdict shall be "Guilty With Recommendation of Life Imprisonment."

If you are unable to agree as to punishment, your verdict shall be "Guilty Without Recommendation."

[Denied]

[Filed Nov. 15, 1962]

[VERDICT]
(#1 - Willie Lee Stewart)

On this 15th day of November, 1962, came the parties aforesaid, in the manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday afternoon; whereupon after hearing the instructions of the Court, the Court discharges the alternate jurors and the jury retires to consider its verdict; and thereupon the jury comes into Court at 4:15 P.M. and upon their oath say that the defendant, Willie Lee Stewart, is 'guilty as charged'; whereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that the defendant is 'Guilty as Charged'.

The Court defers sentencing until Tuesday, November 20, 1962.

By direction of

Alexander Holtzoff
Presiding Judge
Criminal Court # Two

* * * * * *

[Filed Nov. 16, 1962]

MOTION IN ARREST OF JUDGMENT
(#1 - Willie Lee Stewart)

The defendant moves in arrest of judgment on the grounds:

1. The Court lost jurisdiction when it struck down an essential part of the Court's jurisdiction; that is to say, adequate representation by counsel free to exercise his own judgment in matters of trial strategy.

2. The Court is without jurisdiction to impose the sentence for the further reason that the Court did not instruct the jury that in the event it found guilt it must consider the question of punishment.

/s/ Charles B. Murray

/s/ Gary Bellow
Attorneys for the Defendant

[Certificate of Service]

* * *

[Filed Nov. 16, 1962]

MOTION FOR A NEW TRIAL
(#1 - Willie Lee Stewart)

The defendant moves for a new trial on the ground that the Court erred:

1. In depriving the defendant of adequate representation by compelling counsel for the defendant against his judgment and under pain of contempt to call all witnesses on the issue of insanity at a time chosen by the Court and not by counsel for the defendant.

2. In other respects appearing of record which deprived the defendant of a fair trial and verdict.

/s/ Charles B. Murray

/s/ Gary Bellow
Attorneys for the Defendant

* * *

[Certificate of Service]

[Filed Nov. 20, 1962]

[DENIAL OF MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL]
(#1 - Willie Lee Stewart)

On this 20th day of November, 1962, came the attorney of the United States, the defendant in proper person and by his attorney, Charles B. Murray; whereupon the motions of the defendant in arrest of judgment and for a new trial, coming on to be heard, is DENIED by the Court.

The defendant is remanded to the District of Columbia Jail.

By direction of

Alexander Holtzoff
Presiding Judge
Criminal Court # Two

* * *

* * *

[Filed Nov. 20, 1962]

JUDGMENT AND COMMITMENT
(#1 - Willie Lee Stewart)

On this 20th day of November, 1962, came the attorney of the Government, and the defendant appeared in person and by counsel, Charles B. Murray, Esquire;

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of:

Murder in the First Degree

as charged in count one of the indictment,

And the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

The sentence of the Court is as follows; and it is so adjudged.

Willie Lee Stewart, you have been found guilty upon an indictment including the charge for the offense of Murder in the First Degree, and, upon the verdict of guilty, you are hereby sentenced to the punishment of death by electrocution; and it is

ORDERED that you, Willie Lee Stewart, be forthwith taken to the District of Columbia Jail, otherwise known as the Washington Asylum and Jail, in the District of Columbia, and there be kept in close confinement; and that on the 4th day of January A.D. 1963, you be taken to the place prepared for your execution in the District of Columbia Jail, and that then and there you be electrocuted according to law, and MAY GOD HAVE MERCY ON YOUR SOUL.

IT IS FURTHER ORDERED that a certified copy of this Judgment and Commitment be transmitted by the Clerk of the United States District Court for the District of Columbia, to the Superintendent of the aforesaid District of Columbia Jail not less than ten days prior to the time fixed in this Judgment of the Court for the execution of the same.

/s/ Alexander Holtzoff
Judge

[Filed Nov. 21, 1962]

ORDER SETTING NEW DATE OF EXECUTION
(#1 - Willie Lee Stewart)

It appearing to the Court that an appeal has been taken from the judgment and sentence pronounced in the above-entitled cause on the 20th day of November, 1962, it is, therefore, by the Court, this 21 day of November, 1962,

ORDERED that the sentence of death pronounced upon the said defendant on the 20th day of November, 1962, to take effect on the 4th day of January A.D., 1963, be and is hereby stayed and postponed to be carried into effect on the 5th day of April, 1963, provided, however, that if the appeal now pending in the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 20th day of November, 1962, shall not have been determined by the date herein fixed for execution, the sentence of death shall be stayed until the receipt of the mandate of said Court of Appeals, or, if certiorari shall have been granted, the mandate of the United States Supreme Court shall have issued to this Court and this Court shall have fixed a new date of execution.

/s/ Alexander Holtzoff
JUDGE